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No.____

IN THE
Supreme Court of the United States

PHOTOGRAMMETRIC DATA SERVICES, INC. and DAVID G. WEBB,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the 1994 amendment to the mail fraud statute reaches purely intrastate deliveries by private or commercial interstate carriers and, if so, whether, in regulating the purely intrastate use of non-governmental delivery services, Congress exceeded its powers under the Commerce Clause.

2. Whether *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), has any continuing viability following the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and, if so, how the *McMillan* decision is to be applied in light of *Apprendi*.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Petitioner Photogrammetric Data Services, Inc. states that there are no parent companies, subsidiaries and/or affiliates that have issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Photogrammetric Data Services, Inc. and David G. Webb, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was entered on July 30, 2001, is reported at 259 F.3d 229 (CA4 2001), and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a-51a. The memorandum opinion of the United States District Court for the Eastern District of Virginia, entered June 21, 2000, is reported at 103 F. Supp. 2d 875 (E.D.V.A. 2000), and is reprinted in Pet. App. at 52a-74a.

STATEMENT OF JURISDICTION

The court of appeals entered its decision on July 30, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1341 of Title 18 of the United States Code provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a

financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

The decision below raises two important questions. The first is whether Congress, when it amended the mail fraud statute in 1994, purported to regulate purely intrastate deliveries by private or commercial carriers and, if so, whether the legislation exceeded Congress's power under the Commerce Clause. The second question is whether the petitioners in this case, who were convicted of participating in a scheme involving less than $20,000 of fraudulent invoices, but were sentenced on the basis of more than $400,000 of invoices not charged as fraudulent in the indictment or found to be fraudulent by the jury, were sentenced in a constitutionally permissible manner.

Decisions Below

On December 22, 1999, Photogrammetric Data Services, Inc. ("PDS") and David Webb (collectively "defendants") were indicted on four counts of false statements under 18 U.S.C. § 1020 and four counts of mail fraud under 18 U.S.C. § 1341. Pet. App. at 53a. All counts stemmed from allegations that defendants submitted inflated invoices to prime contractors who were working on Virginia Department of Transportation preliminary engineering projects. Pet. App. at 54a.

On defendants' motion, the district court acquitted defendants on two counts. On March 31, 2000, defendants were convicted of two § 1020 violations and three counts of mail fraud under § 1341. Pet. App. at 54a. The total amount of loss associated with the convicted counts was $19,008.

Pet. App. at 43a. The mail fraud convictions were all based on testimony that the allegedly fraudulent invoices were sent from Sterling, Virginia to Richmond, Virginia via "UPS Ground." There was no evidence presented at trial that any of the invoices in question ever crossed state lines. *Id.* at 23a-24a.

Mr. Webb and PDS were sentenced on June 23, 2000. Based on an adjusted offense level of 17, Mr. Webb was sentenced to 24 months in prison, two years of supervised release, and ordered jointly with PDS to make restitution of $435,038.33. Pet. App. at 5a. Also based on an adjusted offense level of 17, PDS was placed on one year of probation, fined $522,045.29, and ordered jointly with Mr. Webb to make restitution in the amount of $435,038.33. *Id.* The sentences were based on a finding made at the sentencing hearing that the amount of loss associated with the fraudulent scheme was actually $435,038.33, as opposed to the $19,008 the Government proved at trial.[1]

Defendants appealed their convictions to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed, holding that the 1994 amendment to the mail fraud statute, which criminalized the use of a private or commercial interstate carrier in furtherance of a fraudulent scheme, could be applied to defendants, despite the fact the

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1. This finding resulted in a nine-level enhancement for the amount of the loss pursuant to U.S.S.G. § 2F1.1, three times the three-level enhancement warranted based on the loss proven at trial. In Mr. Webb's case, had the three-level loss enhancement been used, he would have been at an adjusted offense level of 11, and would have fallen in Zone C of the sentencing table. Accordingly, if he had been given the low end of the Guidelines range, rather than facing 24 months of incarceration, he would have faced a split sentence with a mere four months of incarceration. The fines and restitution orders imposed on both defendants would also have been substantially lower.

invoices at issue traveled solely intrastate. The Fourth Circuit also held that defendants' sentences were constitutional, even though they were based primarily on more than $400,000 of "other relevant conduct." The Fourth Circuit's conclusion was based on its belief that, because the sentences were within the statutory maximum for the offenses of which they were convicted, they were constitutional under both *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet App. at 43a-44a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Erred In Concluding That The 1994 Amendment To The Mail Fraud Statute Regulates Purely Intrastate Conduct And That *United States v. Lopez* Allows Congress To Exercise Almost Unlimited Power To Regulate Intrastate Activity Under The Commerce Clause.

The Fourth Circuit's holding that the mail fraud statute reaches the purely intrastate use of a private or commercial interstate carrier was incorrect. There is no indication that Congress intended to regulate wholly intrastate activity when it amended the mail fraud statute in 1994. The Fourth Circuit's decision also misreads *United States v. Lopez*, 514 U.S. 549 (1995), by permitting Congress to exceed its Commerce Clause powers and regulate purely intrastate activities. The Court should grant certiorari to correct a misinterpretation of one of the most commonly-charged criminal statutes and to clarify the outer limits of congressional authority under the Commerce Clause.

A. The Fourth Circuit Incorrectly Held That The 1994 Amendment To The Mail Fraud Statute Regulates Purely Intrastate Activity.

The issue below was whether the 1994 amendment to the mail fraud statute proscribes the purely intrastate use of a private or commercial carrier in furtherance of a fraud. As with any matter of statutory interpretation, the starting point of the analysis is a determination of whether the statutory language itself has a plain and unambiguous meaning. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The relevant language at issue is the proscription against: "deposit[ing] or caus[ing] to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier" in furtherance of a scheme to defraud.

The Fourth Circuit concluded that the above language plainly and unambiguously addresses intrastate deliveries. Pet. App. at 26a. This conclusion is based solely on the Fourth Circuit's observation that if Congress had wanted to clarify that it was only addressing interstate deliveries, it could have added language such as "across state lines" after the phrase "sent or delivered." *Id.* However, the fact that Congress could have been clearer had it intended one outcome hardly leads to the conclusion that it necessarily intended the opposite outcome. One can, of course, equally argue that if Congress were intending to address intrastate deliveries, it could have added the phrase "including intrastate deliveries" after the phrase "interstate carrier." Indeed, given the rule of lenity and the strong presumption that statutes should be interpreted so as not to upset the traditional balance between federal and state criminal law enforcement, the latter interpretation appears to be more defensible. *United States v. Bass*, 404 U.S. 336, 348-49

(1971) ("Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.")

Regardless of what language Congress could have used, the fact is that the 1994 amendment specifically uses the term "interstate" and fails to use the term "intrastate." One can readily conclude that Congress did not believe that one is acting as an "interstate" carrier when one is delivering an item intrastate. Accordingly, by specifically limiting itself to addressing "interstate" carriers, Congress was not addressing intrastate deliveries.[2] At a minimum, the Fourth Circuit was incorrect to conclude that Congress was, by limiting itself to "interstate" carriers, plainly and unambiguously addressing intrastate deliveries.

The Fourth Circuit's conclusion that the statutory language of the 1994 amendment is plain and unambiguous in evincing an intent to regulate intrastate activity is

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2. The Fourth Circuit seems to read much into the fact that prior to 1994, the mail fraud statute criminalized the improper use of the United States Postal Service and made no distinction between interstate and intrastate deliveries by the Postal Service. However, as the Fourth Circuit recognized, the pre-1994 statute was grounded in the Postal Power and was an effort to protect the integrity of the Postal Service. Pet. App. at 25a (citing *United States v. Elliott,* 89 F.3d 1360, 1363-64 (CA8 1996)). As the Fourth Circuit also acknowledged, however, in adding the 1994 amendment, Congress was acting not under its Postal Power, but under the Commerce Clause. Pet. App. at 26a. The purpose of the Commerce Clause is to protect the integrity of interstate commerce. There is no basis for Congress to protect the integrity of private or commercial intrastate deliveries. Accordingly, while Congress in the pre-1994 version of the statute was proscribing the fraudulent use of the mails, without limiting itself to the interstate use of the mails, it specifically limited itself in the 1994 amendment to the fraudulent use of "interstate" private and commercial carriers, evidencing an intent to reach carriers other than the Postal Service only when those carriers were acting interstate.

particularly indefensible in light of the strong presumption *against* such a conclusion. The Fourth Circuit simply ignores the considerable authority from this Court recognizing that Congress cannot alter the delicate balance between state and federal government by amending the mail fraud statute to reach purely intrastate activities without an unmistakably clear statutory statement by Congress that this was, in fact, its intent. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States"); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) ("if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'").

Had the Fourth Circuit properly recognized that the statutory language of the 1994 amendment falls well short of demonstrating such an unmistakable intent, it would have concluded that the legislative history must be reviewed for guidance as to the proper interpretation of the statutory language. Specifically, the relevant Committee Reports should be examined: "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984).

The Committee Report concerning the 1994 mail fraud amendment indicates that Congress intended to reach only interstate deliveries. Indeed, the Committee Report demonstrates that the very impetus behind the 1994 amendment was to prevent fraudulent telemarketers from avoiding mail fraud prosecution by using private or

commercial carriers, rather than the United States Postal Service, to make interstate deliveries in furtherance of their fraudulent activities.

As outlined in the Congressional Report, entitled *"The Scourge of Telemarketing Fraud: What Can Be Done Against It?,"* the reason why an amendment to the mail fraud statute was proposed, and ultimately passed, was to address "the increased use of Federal Express and other private courier companies which takes the schemes out of the scope of the mail fraud statute." H.R. REP. 102-421, at 63 (1991). The Committee adopted the reasoning of a witness who testified before it who "saw 'little reason why a distinction should be made between use of the mails and a private carrier service,' because there was still an *interstate* communication to perpetrate a fraud." *Id.* (emphasis added). *See also Mail Fraud, Telemarketing Fraud, and the Proposed "Senior Citizens Against Marketing Scams Act": Hearings on S 557 Before the Subcomm. on Postal Operations and Services of the House Comm. on the Post Office and Civil Serv.*, 1993 WL 738310 (F.D.C.H.) (1993) (noting "increasing volume of *interstate* deliveries that are now handled by entities other than the U.S. Postal Service" (emphasis added)).[3]

Independent of the legislative history of the 1994 amendment, the language of the sister statute to the mail fraud statute, the wire fraud statute, 18 U.S.C. § 1343, likewise provides evidence that Congress did not intend to

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3. In 1994, when the mail fraud amendment was passed, virtually all shipments made by a major private commercial air carrier, Federal Express, traveled interstate. Federal Express used a hub and spoke distribution system that routed all shipments through its hub in Memphis, Tennessee. By contrast, there is no evidence in the instant case, that the UPS Ground deliveries, from one city in Virginia to another city in Virginia, ever traveled interstate.

invoke its powers under the Commerce Clause to regulate intrastate activity undertaken in furtherance of a fraud. The Court has previously held that the wire fraud statute and the mail fraud statute are to be given similar construction. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987); *see also United States v. Richards*, 204 F.3d 177, 207 n.13 (CA5 2000). The wire fraud statute requires an interstate use of the wires. *See Neder v. United States*, 527 U.S. 1, 20 (1999); *United States v. Darby*, 37 F.3d 1059, 1067 (CA4 1994); *McCoy v. Goldberg*, 748 F. Supp. 146, 154 (S.D.N.Y. 1990). At least one circuit has explicitly recognized that Congress confined itself in the wire fraud statute to interstate wires because it recognized that its "power over intrastate activities is limited by the Commerce Clause." *United States v. Lindemann*, 85 F.3d 1232, 1241 (CA7 1996). *See also* Anne S. Dudley and Daniel F. Schubert, *Mail and Wire Fraud*, 38 Am. Crim. L. Rev. 1025, 1030 (2001) ("This interstate requirement arises as a result of Congress' reliance on its Commerce Clause powers to assert jurisdiction over wire fraud").

There is absolutely no reason to believe that Congress, in enacting the wire fraud statute under its Commerce Clause authority, intended to confine itself to interstate activity, but when acting under its Commerce Clause authority under its sister statute, the mail fraud statute, intended also to address intrastate activity. The Fourth Circuit's conclusion to the contrary is based on its failure to recognize the distinction between Congress's enactment of the pre-1994 mail fraud statute under its Postal Power, which gives Congress the power to regulate the use of the Postal Service, whether interstate or intrastate, and its enactment of the 1994 amendment reaching private and commercial activity under the Commerce Clause, which by its terms is confined to the regulation of interstate commerce.

Because the Fourth Circuit mistakenly concluded that Congress's intent to regulate purely intrastate deliveries by private and commercial carriers was plain and unambiguous from the statutory language of the 1994 amendment, it failed to attach significance to these plain indications in the legislative history of the amendment and in the construction of a closely-related statute that Congress was merely intending to proscribe fraudulent interstate deliveries using services other than the United States Postal Service. In so doing, the Fourth Circuit improperly ignored Congress's intent and misread the 1994 amendment to the mail fraud statute.

B. The Fourth Circuit Interpreted *Lopez* In A Manner That Gives Congress Expansive And Nearly Limitless Power Under The Commerce Clause.

Assuming that Congress, in enacting the 1994 amendment, did, in fact, purport to regulate the purely intrastate use of private or commercial carriers, it exceeded its authority under the Commerce Clause. The Fourth Circuit erred in holding that the application of the mail fraud statute to the use of a private or commercial interstate carrier to deliver an item intrastate is a permissible exercise of Congress's Commerce Clause power under *United States v. Lopez*, 514 U.S. 549 (1995). Rather than recognizing *Lopez* as delineating a restriction on Congress's power, the Fourth Circuit improperly read *Lopez* as implicitly expanding Congress's power under the Commerce Clause. If the Fourth Circuit's error is not corrected, *Lopez* will be used to justify an unprecedented expansion of congressional power under the Commerce Clause to regulate activities that constitutionally are left to the exclusive province of the states.

In *Lopez*, the Court identified three finite categories pursuant to which Congress may properly exercise its Commerce Clause power: (1) to "regulate the use of the channels of interstate commerce"; (2) "to *regulate and protect* the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; or (3) "to regulate those activities having a substantial relation to interstate commerce." *Id.* at 558-59 (emphasis added). The majority of the Fourth Circuit panel below held that the regulation of the purely intrastate use of non-governmental delivery services fell within the second category.

When the Court held that Congress may, under this second category, "regulate and protect" instrumentalities of interstate commerce, it cited three cases as examples of such authority. *Id.* (citing *Shreveport Rate Cases*, 234 U.S. 342 (1914); *Southern R.R. Co. v. United States*, 222 U.S. 20 (1911); *Perez v. United States*, 402 U.S. 146 (1971)). Unlike the present case, all three of these cases, in fact, involved the *regulation* and *protection* of instrumentalities of interstate commerce.

In *Shreveport Rate Cases*, 234 U.S. 342 (1914), the Court held that Congress could regulate the rates charged by a railroad, an instrumentality of interstate commerce, despite the fact that the railroad was also an instrument of intrastate commerce. *Id.* at 351. Because the interstate and intrastate transactions of the railroad were so related that the regulation of rates charged for one necessarily resulted in the regulation of the rates of the other, Congress could regulate the rates charged by the railroad for both interstate and intrastate transportation. *Id.* Similarly, in *Southern R.R. Co. v. United States*, 222 U.S. 20 (1911), the Court held that Congress may properly regulate the safety of railroad cars moving both in

intrastate and interstate commerce. *Id.* at 26. Because the goal sought to be achieved (safety of workers) could only be met by regulating both interstate and intrastate traffic, the Court upheld the regulation of both. Likewise, in *Perez v. United States*, 402 U.S. 146 (1971), the Court cited 18 U.S.C. § 32, which criminalizes the destruction of aircraft or aircraft facilities, as an example of Congress's ability to regulate and protect the instrumentalities of interstate commerce. *Id.* at 150.

If the 1994 amendment had sought to regulate the safety of private or commercial interstate carriers, then its application to intrastate deliveries would be a permissible exercise of Congress's power, as held in *Southern R.R. Co.* Similarly, if the 1994 amendment sought to regulate the rates charged by interstate carriers, the regulation of the rates of intrastate deliveries by interstate carriers may have been a permissible exercise under *Shreveport Rate Cases*.

The 1994 amendment, however, did not attempt to regulate and protect private and commercial interstate carriers. Rather, the 1994 amendment regulates the improper *use* of private and interstate carriers. *See* Pet. App. at 50a (Williams, J., concurring in part, concurring in judgment) (concluding *Lopez*'s second category did not apply "[b]ecause the mail fraud statute regulates the improper use of the instrumentality but in no way regulates and protects the instrumentality itself . . .").

Allowing the Fourth Circuit's ruling to stand would substantially broaden Congress's power under the Commerce Clause. For example, Congress could pass a statute authorizing federal prosecution any time any "instrumentality" of interstate commerce is used in commission of the crime. Red Top taxicabs are instrumentalities of interstate commerce. This is because

these primarily Virginia cabs sometimes take passengers from Virginia to Maryland or the District of Columbia. If a person robbed a convenience store in Alexandria, and flagged down a Red Top taxi to take him from Alexandria to Arlington in making his getaway, that person would be subject to federal prosecution under such a statute. The fact that the statute was not regulating or protecting the instrumentality of interstate commerce, the Red Top taxi, but rather was merely proscribing its improper use, would suffice to allow Congress to invoke the Commerce Clause to assert jurisdiction over the offense under the Fourth Circuit's interpretation.

Indeed, Congress could remove the interstate commerce jurisdictional element in a host of existing federal statutes and proscribe purely intrastate criminal conduct as long as some interstate instrumentality was tangentially involved in the offense. *See, e.g.*, 18 U.S.C. § 842(a)(3)(A) (transport of explosive materials in interstate commerce); 18 U.S.C. § 875(c) (use of interstate wires to threaten individuals); 18 U.S.C. § 1201(a)(1) (interstate transport of kidnapping victims); 18 U.S.C. § 2261 (interstate domestic violence); 18 U.S.C. § 2262 (interstate violation of protection order); 18 U.S.C. §§ 2312-2315 (interstate shipment of stolen goods); 18 U.S.C. § 2421 (knowingly transporting any individual in interstate commerce for prostitution); 18 U.S.C. § 2423 (transporting minors in interstate commerce, for prostitution). It would not matter, for example, whether the explosives were transported interstate, as long as they were transported intrastate using an instrumentality of interstate commerce such as a car or a truck.

This breathtakingly broad reading and expansion of the Commerce Clause interprets *Lopez*'s second category "in a manner that allows Congress unbounded authority to legislate federal criminal laws that only incidentally involve

instrumentalities of interstate commerce..." Pet. App. at 49a (Williams, J., concurring in part, concurring in judgment). If, indeed, *Lopez* supports such an expansive interpretation of the Commerce Clause, this Court should state so explicitly. If, on the other hand, *Lopez* was intended to set forth narrow, circumscribed areas where a direct impact on the instrumentalities of interstate commerce supports the exercise of congressional power to protect the instrumentality of interstate commerce, the Court should grant certiorari to correct the Fourth Circuit's erroneous interpretation of *Lopez*.

II. Certiorari Should Be Granted To Decide The Continued Viability Of *McMillan v. Pennsylvania* In Light Of *Apprendi v. New Jersey*.

Petitioners were convicted of five counts of fraud involving invoices totaling less than $20,000. They were sentenced, however, on the basis of more than $400,000 of "other relevant conduct." This judicial "amount of loss" finding, based on a preponderance of the evidence standard, was more than twenty times the amount of loss charged in the indictment and proven to the jury at trial and it exposed petitioners to a substantially more severe sentencing range under the Sentencing Guidelines.

The sentencing issue presented here is whether it is unconstitutional to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. This is an important and recurring issue in all federal cases involving economic crimes, as well as other cases in whic.. post-conviction quantity determinations affect sentences.

Cases decided by the Court during the past two years, most notably *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), call the constitutionality of this much-criticized sentencing practice into question. This case is an ideal vehicle to resolve whether current sentencing practices for economic crimes are constitutional in light of recent Court decisions. The facts are clear and the standard of review is *de novo*. This sets this case apart from a large number of similar appeals reviewed under a "plain error" standard.

A. The Court Should Resolve The Question Of Whether Facts That Expose A Defendant To An Increased Specific Sentencing Range Must Be Proven To A Jury Beyond A Reasonable Doubt.

The judicial underpinnings for the "other relevant conduct" provisions of the Sentencing Guidelines come from *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (5-4 decision). There, for the first time, the Court made a distinction between the "elements" of an offense, which must be proven to a jury beyond a reasonable doubt, and "sentencing factors," which can be found by judges based on a lesser standard of proof and used to enhance a sentence. *Id.* at 89-90. *McMillan* paved the way for the implementation of current federal sentencing practices under which facts found by a judge, based only upon a preponderance standard, can greatly increase the range of sentences to which the defendant is exposed.

Recent decisions of the Court have called into question whether the rule set forth in *McMillan* applies to all sentencing factors or whether the Constitution requires that some sentencing factors be proven to a jury beyond a

reasonable doubt, even though they were not designated as "elements" of the offense. Justice Souter's opinion for the Court in *Jones* is illustrative:

> The point is simply that diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled.

526 U.S. at 248.

Two other justices, in their concurring opinions in *Jones*, clearly stated how they would have resolved this unsettled issue: they favored a rule that required not only proof beyond a reasonable doubt of all facts that determine a statutory sentencing range, but also proof beyond a reasonable doubt of all facts that increase the legally-prescribed "range" of penalties to which a criminal defendant is exposed. The first words of Justice Stevens's concurrence in *Jones* are: "I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Jones*, 526 U.S. at 252-53 (Stevens, J., concurring). Justice Scalia also articulated his concern: "I set forth as my considered view, that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." *Jones*, 526 U.S. at 253 (Scalia, J., concurring).

Thus, after *Jones*, a majority of the Court was of the view that the question of whether removing facts that determine the applicable sentencing range from the jury's control was

"a genuine Sixth Amendment issue not yet settled" and two justices were on record as favoring a rule that would, in all relevant respects, overrule *McMillan*.

The reason that the rule proposed by Justices Stevens and Scalia in *Jones* would effectively overrule *McMillan* and strike down current sentencing practices under the Sentencing Guidelines is that both federal statutes and the Guidelines are binding on the courts. From a constitutional perspective, because the Guidelines are not discretionary, it does not make a difference whether the range of punishment to which a defendant is exposed is set forth in a statute or in the Guidelines. Regardless of the source of a sentencing range, the impact on the defendant is the same. *See* Justin A. Thornton and Mark H. Allenbaugh, *Apprendicitis: A Troubling Diagnosis for the Sentencing of Hackers, Thieves, Fraudsters, and Tax Cheats*, 9 Geo. Mason L. Rev. 419, 444-48 (2000) (discussing sentencing of defendants convicted of economic crimes and stating that "[u]nlike sentencing for virtually all other federal crimes, sentencing for the most common forms of economic crimes is driven *entirely* by sentencing factors") (emphasis in original); Frank O. Bowman, *Coping With Loss: A Reexamination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 Vand. L. Rev. 461, 464 (1998) ("The primary determinant of sentence length for federal economic criminals is the amount of 'loss' resulting from an offender's conduct").

A year after *Jones* was decided, the *Apprendi* Court concluded that, where a factual determination at sentencing results in a sentence that exceeds the otherwise applicable statutory maximum, the Constitution is in fact violated. However, the Court neither reconciled its new holding with *McMillan* nor explained how, if at all, the rights to a jury trial and to due process are implicated by factual determinations at sentencing that increase the applicable

sentencing range, but not beyond the otherwise applicable statutory maximum. In *Apprendi*, the Court expressly held that it now embraces the rule proposed by Justices Stevens and Scalia in their concurring opinions in *Jones*: "[W]e endorse the statement of the rule set forth in the concurring opinions in [*Jones*]. 'It is unconstitutional . . . to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" *Apprendi*, 530 U.S. at 490.

Justice Scalia, in his concurring opinion in *Apprendi*, observed that the right to a trial by jury "has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring; emphasis in original). That reasoning was also endorsed by Justice Thomas in his lengthy concurrence in *Apprendi*. 530 U.S. at 499-523.

The opinion in *Apprendi*, in which the Court adopts the concurring opinions of Justice Stevens and Scalia in *Jones*, seems impossible to reconcile with the reasoning of *McMillan*. The reasoning underlying *McMillan* and *Apprendi* cannot logically coexist in a coherent body of law. If juries must now find all facts that increase the legally-prescribed range of sentences to which a criminal defendant is exposed, then *McMillan* has been effectively overruled — at least with regard to the amount of loss determinations that drove the sentences in this case — and the sentences imposed on petitioners here are unconstitutional.

Justice O'Connor highlighted this seemingly irreconcilable conflict with the Court's precedent in her

dissent in *Apprendi*:

> [T]he Court appears to hold that any fact that increases or alters the range of penalties to which a defendant is exposed -- which, by definition, must include increases or alterations to either the minimum or maximum penalties -- must be proved to a jury beyond a reasonable doubt. . . . Accordingly, it is incumbent on the Court not only to admit that it is overruling *McMillan*, but also to explain why such a course of action is appropriate under normal principles of *stare decisis*.

Apprendi, 530 U.S. at 533 (O'Connor, J., dissenting). Justice O'Connor specifically emphasized that the reasoning underlying *Apprendi* may apply "to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (e.g., the federal Sentencing Guidelines)." *Id.* at 544.

The majority in *Apprendi* responded to Justice O'Connor's observation that *McMillan* had been overruled by stating: "We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict . . . . [W]e reserve for another day the question whether *stare decisis* considerations preclude reconsideration of its narrower holding." *Apprendi*, 530 U.S. at 487 n.13.

Petitioners respectfully submit that the day has come for considering this fundamental issue of constitutional criminal jurisprudence. This case, in which the sentencing court,

while not exceeding the statutory maximum sentence for the counts of conviction, substantially enhanced the petitioners' prescribed sentencing ranges based on factors neither indicted nor proven to a jury, squarely presents the Court with the opportunity to address the issue of *McMillan*'s continuing viability, if any, in the wake of *Apprendi*.

B. Certiorari Is Warranted Now Because: 1) The Lower Courts Have Not Harmonized *McMillan* With *Apprendi*; And 2) Only This Court Has The Power To Overrule *McMillan*.

Since *Apprendi* was decided, there have been hundreds of appeals by defendants challenging the constitutionality of sentences that were based on post-conviction "other relevant conduct" findings. Many of these appeals argued that *McMillan* has been effectively overruled by *Apprendi*. In the pre-*Apprendi* era, some circuits conceded the possibility of successful challenges to sentences within the statutory maximum in cases where sentencing factors overwhelmingly drove the sentence imposed, but they were divided on what standard of proof should be used in such cases. This circuit split was described in detail in *United States v. Watts*, 519 U.S. 148, 156 & n.2 (1997) ("We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence.") The debate in those cases, however, was between the continued use of a preponderance standard and a clear and convincing standard. The beyond a reasonable doubt standard suggested by *Apprendi* was not considered.

Post-*Apprendi* law has not resolved this pre-*Apprendi* circuit-split. Courts, such as the Fourth Circuit in this case, are interpreting *Apprendi* to mean that the only sentences

that warrant constitutional concern are sentences in excess of the statutory maximum for the offense. There is no longer any discussion in the recently-decided cases of the possibility that a higher than preponderance standard of proof should be employed in cases in which sentences are within the statutory maximum, but disproportionate to the sentence warranted based on the facts alleged in the indictment and proven at trial. Thus, rather than recognizing that the burden of proof for substantially enhanced sentencing falling short of statutory maximums was unclear prior to *Apprendi*, and that *Apprendi* explicitly left this question open, the lower courts seem to have read *Apprendi* as silently holding that, as long as the statutory maximum is not exceeded, no enhanced burden of proof is required, regardless of the disparity in magnitude between the charged conduct and the conduct established by a preponderance of the evidence at sentencing. Accordingly, the lower courts, in the absence of further guidance from this Court, are making no attempt to harmonize *Apprendi* with current sentencing practices.

Such a limited interpretation of *Apprendi* would seem unwarranted. Nothing in *Apprendi* purports to limit the scope of its reasoning only to the holding in that case, that the sentence imposed exceeded the statutory maximum based on the conduct proven at trial. Indeed, in *Apprendi*, the Court again invoked the constitutional escape valve first set forth in *McMillan* that unproved sentencing factors should not be the "tail which wags the dog of the substantive offense." *Apprendi*, 530 U.S. at 495.

Moreover, the Court has repeatedly held in the context of post-conviction review that a criminal trial should be the "main event" at which a criminal defendant's rights are determined. *See, e.g., McFarland v. Scott*, 512 U.S. 849, 859 (1994). Under the Sentencing Guidelines, however, the

factual findings at sentencing, such as the "amount of loss" in a fraud case, are frequently the most significant factors in determining the amount of punishment meted out and the opprobrium associated with a criminal offense. This post-conviction fact finding, not the trial, is the "main event" when it comes to the severity of the sentence an offender will receive.

As manifest by the deluge of appeals raising *Apprendi* challenges – challenges that are completely understandable in light of the important issues left unresolved in *Apprendi* – the question presented in this case has extensively and sufficiently percolated in the lower federal courts. Further consideration is unlikely to be instructive. This case presents an ideal factual scenario and the appropriate occasion for the Court to reconsider *McMillan* and address the seemingly irreconcilable tension between *McMillan* and *Apprendi*.

The central sentencing issue in this case is whether it is constitutional to convict defendants for one set of crimes of a specific magnitude and then sentence them for additional or more severe crimes, based on a mere preponderance finding by the sentencing judge. This case presents an ideal opportunity for the Court conclusively to decide an important constitutional issue that goes to the heart of the fairness and integrity of our system of criminal justice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted in this case.

Respectfully submitted,

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October 2001

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-4498, No. 00-4499
259 F.3d 229

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHOTOGRAMMETRIC DATA SERVICES, INCORPORATED,
Defendant-Appellant.

&

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID G. WEBB,
Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge. (CR-99-471).

Argued March 2, 2001
Decided July 30, 2001,

Before: Before WILKINS, WILLIAMS, and TRAXLER, Circuit Judges. Judge Traxler wrote the majority opinion, in which Judge Wilkins joined. Judge Williams wrote an opinion concurring in part and concurring in the judgment.

Opinion by: Traxler

COUNSEL

ARGUED: Laurin Howard Mills, NIXON PEABODY, L.L.P., Washington, D.C., for Appellants.

Jack I. Hanly, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

ON BRIEF: Laura Ariane Miller, NIXON PEABODY, L.L.P., Washington, D.C., for Appellant Webb; David F. Geneson, Lara S. Zick, HUNTON & WILLIAMS, Washington, D.C., for Appellant Photogrammetric. Helen F. Fahey, United States Attorney, Alexandria, Virginia, for Appellee.

OPINION:

TRAXLER, Circuit Judge:

Photogrammetric Data Services, Inc. ("PDS") and David G. Webb ("Webb") appeal their convictions and sentences for highway project fraud, *see* 18 U.S.C.A. § 1020 (West 2000), and mail fraud, *see* 18 U.S.C.A. § 1341 (West 2000). We affirm.

I. Facts

Appellant PDS is a Virginia corporation engaged in the business of preparing topographic maps from aerial photography and ground surveys. Between 1994 and 1999, PDS performed subcontracting work for firms having contracts with the Virginia Department of Transportation ("VDOT") to perform preliminary engineering work for highway construction. Appellant Webb was employed by PDS as the photogrammetric manager during this time period. In December 1999, the United States filed an indictment against PDS and Webb charging highway project fraud, in violation of 18 U.S.C.A. § 1020, and mail fraud, in violation of 18 U.S.C.A. § 1341. The charges stemmed from allegations that PDS and Webb had engaged in a broad, long-term practice of submitting inflated invoices to VDOT's prime contractors, who in turn passed the invoices on to VDOT for payment.

According to the evidence, VDOT set initial limits on the amount of money that its contractors could bill for a particular job awarded, based upon estimates of hours submitted in advance by the contractors. The contractors were then paid according to the actual number of hours worked, up to the pre-approved limit, after which additional approval was required. At PDS, employees and managers completed time sheets showing the amount of hours worked on each particular job, which were then used to prepare the PDS invoices for the VDOT jobs. The actual hours worked by PDS employees, however, would often fall short of the number of hours pre-approved by VDOT and, if billed correctly, would have resulted in PDS leaving "money on the table." Consequently Webb's predecessor and Webb, who were responsible for the PDS billings on the VDOT jobs, manipulated the employee timesheets and the amount of hours allotted to PDS managers in order to ensure that

PDS billed close to the dollar limits pre-approved by VDOT.

In late 1997, an employee of PDS approached law enforcement officers with information concerning PDS's long-standing practice of inflating the VDOT invoices. With the assistance of this employee acting as a government informant, including his recording of incriminating statements made by Webb at the workplace, FBI and state law enforcement agents began investigating the alleged billing fraud and eventually procured a warrant to search the PDS offices for documentation of the fraudulent scheme.

On the morning of January 20, 1999, agents executed the search warrant at the offices of PDS. At the beginning of the search PDS employees were directed to a conference room, away from the areas to be searched and, while the search was being conducted, some of these employees were interviewed by other agents. That same morning, two agents traveled to Webb's home, arriving before he left for work, to interview him concerning the allegations of fraudulent billing practices. During the interview, Webb made several admissions, including an admission that PDS had been "padding" the hours on the VDOT jobs for five years, a responsibility that he had assumed from the prior VDOT manager four years previously. By Webb's estimation, PDS had increased the billed amounts on almost every VDOT job by approximately ten to fifteen percent, resulting in overbilling of approximately $ 100,000 to $ 200,000 per year for five years. Ultimately, documents seized during the search at PDS, as well as the statements made by Webb to the agents that day, were introduced at trial. However, no statements made by the other PDS employees at the time of the search at PDS were introduced as evidence.

At the conclusion of the trial, PDS and Webb were convicted by a jury of two counts of highway project fraud

and three counts of mail fraud. Webb was sentenced to 24 months in prison and two years of supervised release, and was ordered to make restitution jointly with PDS in the amount of $ 435,038.33. In addition to the order to make joint restitution with Webb, PDS was placed on one year of probation and fined $ 522,045.29. *See United States v. Photogrammetric Data Servs., Inc.*, 103 F. Supp. 2d 875 (E.D. Va. 2000). This appeal followed.

II. Motions to Suppress

We begin with Appellants' assertion that the district court erred in denying their motion to suppress all fruits of the January 20, 1999 search at PDS, including various timesheets and handwritten notes seized at that time, and in denying their motion to suppress the statements obtained from Appellant Webb during the interview at his home that same day. In reviewing the district court's denial of a motion to suppress evidence, we review the district court's factual findings for clear error, and its legal conclusions de novo. *See United States v. Rusher*, 966 F.2d 868, 873 (4th Cir. 1992).

A.

Appellants contend that the district court erred in (1) failing to conduct an evidentiary hearing on the issue of whether the FBI agent procuring the warrant to search the PDS offices made material omissions or misrepresentations to the magistrate judge in his affidavit to obtain the search warrant, (2) failing to exclude all fruits of the search because the law enforcement agents exceeded the permissible scope of the search warrant by detaining and interviewing PDS employees during the search, and (3) denying their motion to suppress without conducting an evidentiary hearing on the issue of whether the law enforcement agents exceeded

the scope of the warrant by their actions. We address these claims in turn.

1.

In a detailed affidavit filed five days before the search at PDS, the investigating FBI agent outlined the suspected fraudulent scheme by PDS, the information obtained from the cooperating PDS employee concerning PDS's long-standing practice of overbilling VDOT contractors, the corroborating evidence that had been located by the FBI at VDOT, and the corroborating information obtained from the recorded conversations between the PDS employee-informant and Webb. The magistrate judge determined that there was probable cause to conduct the requested search at PDS and issued the search warrant.

Appellants now assert that the affidavit was faulty because it failed to inform the magistrate judge that the government had issued a grand jury subpoena to PDS for many of the same materials on the same day, that the government intended instead to use the search warrant as subterfuge to obtain statements from PDS employees in addition to the requested documents, and that the government's cooperating employee witness had stolen documents from PDS, all of which would allegedly have called into question the credibility of the government and its inside witness.

An affidavit supporting an application for a search warrant is entitled to a strong presumption of validity. *See Franks v. Delaware,* 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Consequently, in order to obtain an evidentiary hearing on the integrity of an affidavit, a defendant must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant

in the warrant affidavit." *Id.* at 155-56. The "showing 'must be more than conclusory' and must be accompanied by a detailed offer of proof." *United States v. Colkley,* 899 F.2d 297, 300 (4th Cir. 1990) (quoting *Franks*, 438 U.S. at 171)). "Mere negligence in recording the facts relevant to a probable-cause determination is not enough." *Id.* at 301 (internal quotation marks and alterations omitted).

"The false information must [also] be essential to the probable cause determination: 'if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.'" *Id.* at 300 (quoting *Franks,* 438 U.S. at 171-72). Thus, a *Franks* hearing "serves to prevent the admission of evidence obtained pursuant to warrants that were issued only because the issuing magistrate was misled into believing that there existed probable cause." *United States v. Friedemann,* 210 F.3d 227, 229 (4th Cir.), *cert. denied,* 531 U.S. 875, 121 S. Ct. 180, 148 L. Ed. 2d 124 (2000).

We are satisfied that the district court did not err in refusing to conduct a *Franks* hearing. Appellants failed to make a substantial preliminary showing that the FBI agent procuring the PDS search warrant made any false statements knowingly and intentionally, or with reckless disregard for the truth, in the warrant affidavit. Nor do the alleged omissions of which Appellants complain alter the probable cause determination such that the warrant was issued by the magistrate judge because he was misled into believing that probable cause existed. First, the fact that a grand jury subpoena existed and that the FBI intended to interview PDS employees at the time of the search obviously had no effect upon whether probable cause existed to search the PDS offices for documents which were properly included within the warrant's scope. Second, the alleged "stolen" documents appear to consist of one document which the

informant had reviewed during the normal course of his employment, but which he actually took from Appellant Webb's locked desk drawer. When provided to the FBI, the document was locked away and never used. Appellants have made no claim that the documents relied upon in the warrant affidavit were "stolen" or otherwise improperly obtained and no showing that the document taken by the informant from the locked desk drawer was ever relied upon by the government in any way. And, Appellants have not demonstrated that this isolated act on the part of the informant somehow operated to defeat the sufficiency of the probable cause showing otherwise made or that it so seriously undermined his credibility as to render the balance of the substantial probable cause showing unreliable.

Accordingly, we conclude that the district court did not err in refusing to hold a *Franks* hearing and in refusing to grant the motion to suppress the evidence obtained as a consequence of the warrant executed at PDS.

2.

Appellants next claim that the court should have suppressed all fruits of the search at PDS because, by detaining and interviewing PDS employees, the agents acted in "flagrant disregard" of the scope of the search warrant, which authorized only the seizure of certain documentary and computer records, rendering the otherwise legal search violative of Appellants' Fourth Amendment rights. *See United States v. Ruhe,* 191 F.3d 376, 383 (4th Cir. 1999). We conclude that the agents did not exceed the scope of the warrant by detaining and interviewing the PDS employees and, in any event, that blanket suppression of all documentary evidence seized in accordance with the warrant would not be required by the Fourth Amendment.

As an initial premise, we find unpersuasive Appellant's argument that the agents unlawfully "seized" the PDS employees at the time of the search. Because they were in possession of a valid warrant to search the premises of PDS for evidence of the fraudulent billing scheme, the agents at PDS necessarily had authority to secure the premises and detain the employees temporarily in order to conduct the search with minimal interference. *Cf. Michigan v. Summers,* 452 U.S. 692, 702-03, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981) (noting that law enforcement officers searching premises for contraband pursuant to a valid search warrant have the authority to temporarily detain the occupants at the premises while the search is being conducted); *United States v. Smith,* 704 F.2d 723, 725 (4th Cir. 1983) (same). In particular, the agents at PDS, suspecting a widespread fraudulent billing practice within the company, had a valid interest in assuring that the altered timesheets they expected to find could be seized before any employee or manager had the opportunity to destroy them. *Cf. Michigan,* 452 U.S. at 702-03 (noting law enforcement's interest in detaining occupants in order to prevent "frantic efforts to conceal or destroy evidence" which could pose a risk of harm to both the police and the occupants).

Even were we to conclude that the employees were improperly detained and interviewed during the search, however, Appellants have not made a showing that their Fourth Amendment rights were violated by the agents' actions in doing so. As a general rule, items properly seized by agents executing a search warrant "may still be admitted even when they are obtained at the same time as improperly seized items." *Ruhe,* 191 F.3d at 383; *see also United States v. Squillacote,* 221 F.3d 542, 556 (4th Cir. 2000), *cert. denied,* 121 S. Ct. 1601, 149 L. Ed. 2d 468 (2001). Thus, "while all evidence which is not identified within a search warrant may be excluded if the executing officer exceeds the

scope of the warrant, such exclusion does not extend to evidence actually named in the search warrant which is discovered during the course of the search." *United States v. Jones,* 31 F.3d 1304, 1314 (4th Cir. 1994). Properly seized evidence will be excluded only "in extreme circumstances . . . when the officers executing the warrant exhibit a 'flagrant disregard for its terms.'" *Ruhe,* 191 F.3d at 383 (quoting *Jones,* 31 F.3d at 1314). "The extraordinary remedy of blanket suppression of all evidence seized should be used only when the violations of the warrant's requirements are so extreme that the search is essentially transformed into an impermissible general search," *Squillacote,* 221 F.3d at 556 (internal quotation marks omitted), such as when officers have seized "large quantities of evidence clearly not within the scope of the warrant," *id.*

In this case, of course, Appellants contend that the district court erred in admitting the properly seized documents obtained at PDS pursuant to the valid search warrant because the agents also interviewed employees while the search was being conducted. However, there is no allegation that the agents ever exceeded the scope of the search warrant in the seizure of the documents, and no statements obtained from the employees were admitted as evidence during the trial. Nor is there even an assertion that any documents ultimately obtained or admitted into evidence were only able to be procured as a result of statements made by the employees that day. Under the circumstances, we do not view the agents' interviewing of employees who had been detained during the execution of a search warrant as acts taken in "flagrant disregard" of the terms of the search warrant. Therefore, the extreme remedy of blanket suppression of the documentary evidence covered by the terms of the warrant was not required and the district court properly denied Appellants' motion to suppress on this basis.

3.

For similar reasons, we reject Appellants' alternative contention that the district court should have held an evidentiary hearing on the motion to suppress because there was a factual dispute as to whether the employees were forcibly detained and coercively questioned. *Cf. United States v. Taylor,* 13 F.3d 786, 789 (4th Cir. 1994) (holding that "when material facts that affect the resolution of a motion to suppress evidence seized during a warrantless search are in conflict, the appropriate way to resolve the conflict is by holding an evidentiary hearing after which the district court will be in a position to make findings"). Appellants assert that they created a material factual dispute through the affidavits of several of the PDS employees who were interviewed during the search. However, while there does appear to be some discrepancy in the extent of the detention and questioning employed by the agents, as well as in the perceptions of the employees concerning their rights at the time, we cannot say that the district court erred in failing to conduct an evidentiary hearing. Even if we were to accept the version of events as set forth in the employee affidavits, Appellants were not entitled to suppression of the timesheets and other documents obtained in the search at PDS. Appellants offered no support for their conclusory claim that the search warrant was "mere subterfuge" to detain and interrogate the employees. And, as noted previously, the documentary evidence obtained and sought to be admitted was unquestionably within the scope of the search warrant, whereas the statements taken from the employees were not admitted into evidence.

B.

Webb next contends that the statements in which he admitted padding the invoices submitted to the prime contractors, given to law enforcement agents during the

January 20, 1999 interview at his home, should have been suppressed because they were made during a custodial interrogation without his having been advised of his right not to incriminate himself. We disagree.

It is, of course, well established that persons who are "'taken into custody or otherwise deprived of [their] freedom of action in any significant way'" must be given *Miranda* warnings before being questioned. *Stansbury v. California,* 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) (per curiam) (quoting *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). In *Miranda*, the Supreme Court afforded protection to the Fifth Amendment privilege against compelled self-incrimination "from the coercive pressures that can be brought to bear upon a suspect in the context of custodial interrogation." *Berkemer v. McCarty,* 468 U.S. 420, 428, 104 S. Ct. 3138 82 L. Ed. 2d 317 (1984). To determine whether a statement is voluntary, we look to see "whether the confession was extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence." *Hutto v. Ross,* 429 U.S. 28, 30, 97 S. Ct. 202, 50 L. Ed. 2d 194 (1976) (per curiam) (internal quotation marks and alterations omitted). "Coercive police activity is a necessary predicate to the finding that a confession is not voluntary." *United States v. Braxton,* 112 F.3d 777, 780 (4th Cir. 1997) (internal quotation marks omitted). However, "the mere existence of threats, violence, implied promises, improper influence, or other coercive police activity . . . does not automatically render a confession involuntary. The proper inquiry is whether the defendant's will has been overborne or his capacity for self-determination critically impaired." *Id.* at 780 (internal quotation marks omitted). "Courts must consider the totality of the circumstances, including the characteristics of the defendant, the setting of the interview, and the details of the

interrogation." *Id.* at 781 (internal quotation marks omitted); *see also United States v. Howard,* 115 F.3d 1151, 1154 (4th Cir. 1997) ("An individual is 'in custody' for *Miranda* purposes when, under the totality of the circumstances, the 'suspect's freedom of action is curtailed to a degree associated with formal arrest.'" (quoting *Berkemer,* 468 U.S. at 440)). When reviewing a motion to suppress admissions of a defendant on the grounds that they were made during a custodial interrogation without *Miranda* warnings, we must accept the district court's findings of fact on the circumstances surrounding a confession unless clearly erroneous, but must make an independent determination on the issue of voluntariness. *See Braxton,* 112 F.3d at 781.

On the morning of January 20th, two law enforcement agents traveled to Webb's home and parked on the street to wait for him to leave for work. Webb came out at approximately 7:00 a.m. and drove down his driveway. The agents then pulled forward to block the driveway, got out of their car, and asked to speak with Webb about his employment at PDS. Webb told the agents that he needed to take his son to the bus stop at a local store first, but that they could follow him to the store. The agents agreed. At the store, Webb dropped his son off and entered the store alone. After returning with a cup of coffee, Webb spoke briefly with the agents. The agents, however, told Webb that they would prefer to return to Webb's home for the interview, and Webb agreed. After returning to Webb's home, Webb and the agents began to speak on Webb's deck, but because of the January weather, the agents asked to go inside. The men then entered Webb's home, where Webb closed his dog in another room before sitting down for the interview. Webb also paused to make a telephone call to his employer to let them know he would be late for work. The interview lasted approximately one and one-half hours, during which time Webb admitted padding the VDOT bills on PDS's behalf.

After receiving evidence concerning the events on that day, the district court found that the officers were not required to give Webb *Miranda* warnings and that the statements made by Webb during the interview in his home were voluntary. Considering the totality of the circumstances, we agree. Prior to the interview at his home, Webb was never placed under arrest, handcuffed, or otherwise restrained. Webb was interviewed in familiar surroundings, in his own home, for a reasonable period of time, where his movements were not restricted. No threats or promises were made to obtain his cooperation, nor was intimidation brought to bear upon him. Indeed, Webb testified that he agreed to speak with the agents both at the store and on the deck of his home.

Nonetheless, Webb asserts on appeal that his admissions were not made voluntarily because one agent got out of his car "brandishing" a sidearm when Webb was first leaving his home, the agents insisted on going inside instead of staying on the deck when they returned for the interview, and he eventually asked for an attorney. We are unpersuaded. First, Webb's own account of the events that morning do not substantiate Appellants' exaggerated claim that "one of the agents got out of the car brandishing his sidearm." Appellants' Brief at 17. Webb testified, in response to a question as to whether he knew the agent approaching his car was a law enforcement officer, that he "noticed that [the officer] was *wearing* a side arm," J.A. 337 (emphasis added), but made no claim that a side arm was "brandished." Second, like the district court, we cannot infer that the agents' request that the interview take place inside Webb's home instead of on the deck somehow turned the interview coercive as opposed to consensual in nature, especially given the fact that it took place in the month of January. Third, and with regard to the only matter in direct dispute, we cannot say that the district court's finding that

the evidence was insufficient to find that Webb requested an attorney was clearly erroneous.

In sum, we are at best left with Webb's after-the-fact assertion that he felt he had little or no choice but to accede to the agents' request for an interview, which is entitled to limited consideration given the totality of the circumstances before us. *See Braxton,* 112 F.3d at 781 ("Subsequent testimony by an accused about his prior subjective mental impressions and reactions must be carefully scrutinized, as such testimony is always influenced by his self-interest." (internal quotation marks and alterations omitted)). Webb failed to establish that the law enforcement agents were so intimidating or overpowering as to overcome his will to resist. Because this was not a custodial situation, the district court did not err in concluding that *Miranda* warnings were not required and, consequently, in refusing to suppress Webb's statements.

C.

PDS separately challenges the district court's admission of the incriminating statements made by Webb to the law enforcement agents on January 20, 1999, as well as Webb's statements made to the government informant and tape-recorded by the informant prior to that time. Specifically, PDS asserts that because Webb did not testify at trial, the admission of Webb's statements against PDS violated PDS's Sixth Amendment right to confrontation. *See Bruton v. United States,* 391 U.S. 123, 126, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The district court ruled that the statements were admissible under Rule 801(d)(2)(D) of the Federal Rules of Evidence and that their admission into evidence did not violate PDS's Sixth Amendment right to confrontation.

"Because a corporation can act only through its employees, a statement by a corporate official . . . can

certainly be considered an admission by a corporate defendant." *United States v. Brothers Constr. Co.*, 219 F.3d 300, 310-11 (4th Cir.), *cert. denied*, 531 U.S. 1037, 121 S. Ct. 628, 148 L. Ed. 2d 537 (2000). And, under Rule 801(d)(2)(D), an out-of-court statement offered as evidence at trial is not considered hearsay if "the statement is offered against a party and is . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D). There is no dispute that the statements Webb made to the government informant (a co-employee) and to the law enforcement agents concerned Webb's billing practices and procedures at PDS while he was employed as the manager of the photogram department. Thus, the statements concerned matters within the scope of Webb's employment with PDS, made during the existence of the employment relationship, and were admissible against PDS under Rule 801(d)(2)(D). *See Brothers*, 219 F.3d at 309-311 (holding that grand jury testimony of officer and in-house counsel for corporate defendant was properly admitted as admission against the corporate defendant). Indeed, PDS seemingly agrees that Webb's statements would be admissible under the provisions of Rule 801(d)(2)(D), contending instead that the admission of Webb's statements against PDS was improper because it nevertheless ran afoul of PDS's constitutional right of confrontation. We disagree that admission of the statement was error.

The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const. amend. VI. But while "the Confrontation Clause reflects a preference for face-to-face confrontation at trial," *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (footnote omitted), it does not foreclose the

admission of all hearsay statements when the declarant is unavailable, *see id.* at 64. Rather, "reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence," the Confrontation Clause does not prohibit the introduction of hearsay statements of an unavailable declarant which are "marked with such trustworthiness that there is no material departure from the reason of the general rule." *Id.* at 65 (internal quotation marks omitted). "'The focus of the Court's concern has been to insure that there are indicia of reliability which have been widely viewed as determinative of whether the statement may be placed before the jury though there is no confrontation of the declarant, and to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'" *Id.* (internal citation omitted) (quoting *Mancusi v. Stubbs,* 408 U.S. 204, 213, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972)). From these principles, the Court has held that a hearsay statement is admissible and does not violate the Confrontation Clause where the witness is unavailable and the statement bears sufficient "indicia of reliability" in that it falls within a " firmly rooted hearsay exception," or has "particularized guarantees of trustworthiness." 448 U.S. at 65-66; *see also Lilly v. Virginia,* 527 U.S. 116, 124-25, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999) (plurality).

First, a hearsay exception is "firmly rooted" if it "rests upon such solid foundations that admission of virtually any evidence within [it] comports with the 'substance of constitutional protection.'" *Roberts,* 448 U.S. at 66. For example, in *United States v. Saks,* 964 F.2d 1514 (5th Cir. 1992), the Fifth Circuit identified several "firmly rooted" exceptions to the hearsay prohibition that would serve as exceptions to *Bruton*: the hearsay exception for co-conspirators in Rule 801(d)(2)(E), the "spontaneous declaration" exception in Rule 803(2), and the "medical

examination" exception in Rule 803(4) of the Federal Rules of Evidence. *See id.* at 1525; *White v. Illinois,* 502 U.S. 346, 356, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992); *see also Bourjaily v. United States,* 483 U.S. 171, 183, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) (holding that "no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception" like that for co-conspirators under Rule 801(d)(2)(E) (internal quotation marks omitted)); *United States v. Shores,* 33 F.3d 438, 442 (4th Cir. 1994) (observing that *Bruton* does not apply if the non-testifying co-defendant's statement is admissible as a nonhearsay statement under Fed. R. Civ. P. 801(d)(2)(E)); *Folston v. Allsbrook,* 691 F.2d 184, 187 (4th Cir. 1982) (same).

Failing to see any meaningful distinction between Rule 801(d)(2)(E) and Rule 801(d)(2)(D) for purposes of *Bruton*, the *Saks* court held that the agency exception set forth in Rule 801(d)(2)(D) "is equally rooted in our jurisprudence," *Saks,* 964 F.2d at 1525, and, therefore, "if statements meet the requirements of Rule 801(d)(2)(D) . . . the Confrontation Clause is satisfied," *id.* at 1526; *see also United States v. Walker,* 148 F.3d 518, 522 (5th Cir. 1998). Consequently, the court ruled that the prior testimony of defendant's business partner, offered in a prior civil suit pertaining to the alleged criminal acts, was admissible against the defendant in his subsequent criminal suit. *See Saks,* 964 F.2d at 1526.

PDS asserts, however, that the *Saks* court overlooked the fact that current Rule 801(d)(2)(D) broadened the traditional exception for agents' statements in our jurisprudence, which only allowed for the admission of statements "made by the agent acting in the scope of his employment," and not for all "statements related to a matter within the scope of the agency or employment." Fed. R. Evid. 801(d)(2)(D) advisory committee's note; *see also United States v. King,* 134 F.3d 1173, 1174 n.1 (2d Cir. 1998) (noting that "section

801(d)(2)(D) broadened the prior definition of admissible statements of agents," but finding it unnecessary to "decide whether this broadening renders the current version not 'firmly rooted' as a hearsay exception, for purposes of the Confrontation Clause" (internal citation omitted)). Thus, PDS contends that while statements made by Webb to his co-employee during the course of his employment might fall within the historical exception to the hearsay rule, Webb's statements to the law enforcement agents during the interview at his home would not fall within this traditional, or "firmly rooted," exception because he was not acting within the scope of his employment at the time he made the statements.

Although PDS correctly notes that Rule 801(d)(2)(D) broadened the original exception for the admissibility of hearsay statements made by an agent against the agent's employer, we need not decide whether Webb's statements to the law enforcement officials in his home, which clearly fall within the current hearsay exception of Rule 801(d)(2)(D), would also fall within a "firmly rooted" exception to the hearsay rule. Even were we to assume that they do not, the statements contain "particularized guarantees of trustworthiness" such that they need not be subjected to the adversarial testing normally required by the Confrontation Clause.

PDS disagrees, asserting that Webb's statements cannot satisfy the second prong of the *Ohio v. Roberts* test because the Court has firmly held to the general rule that an accomplice's confession that incriminates a defendant is presumptively unreliable. *See Lee v. Illinois,* 476 U.S. 530, 541, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986). But while PDS's recitation of the general rule is an accurate one, it fails to recognize that the Court's holding in this regard was premised upon the "basic understanding that when one person accuses another of a crime under circumstances in

which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Id.* In other words, when a defendant, in the hopes of helping himself, has made a statement which shifts or spreads blame to another defendant or accomplice, the Court has held that statement does not fall within a firmly rooted exception to the hearsay rule and falls outside the realm of trustworthy hearsay statements in general. *See Lilly, 527 U.S. at 134.*

This presumption of unreliability, however, is just that -- a presumption. It may be rebutted if the statement "is supported by a showing of particularized guarantees of trustworthiness." *Lee,* 476 U.S. at 543 (internal quotation marks omitted). And, consistent with the basis upon which the presumption rests, the Supreme Court has also recognized that "the very fact that a statement is genuinely self-inculpatory" -- rather than an attempt to shift blame or curry favor -- "is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Williamson v. United States,* 512 U.S. 594, 605, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994).

We hold that the self-inculpatory statements of Webb contain such "particularized guarantees of trustworthiness" and were properly admitted as evidence against PDS. First, neither *Lee* nor *Lilly* involved the question of the admissibility of an employee's inculpatory statements against his corporate employer, or the question of the criminal liability of the corporate employer based upon the agency relationship with the declarant. Indeed, aside from the question of whether Rule 801(d)(2)(D) is a firmly rooted hearsay exception, we note that the commentary to the current version of the Rule itself recognizes "the reliability and reasonableness of admitting" inculpatory statements made by an employee concerning the very tasks that "he was hired to do." 30B Michael H. Graham, *Federal Practice &*

Procedure § 7023 (2000). The inherent reliability and reasonableness of admitting such statements as evidence against the employer is even more compelling where, as here, the statement is inculpatory of the employee and, thereby, his employer, but is not exculpatory of the employee. Webb's statements admitting that he inflated the VDOT invoices were genuinely self-inculpatory and, while also inculpatory of PDS, the statements in no way attempted to shift blame to another or curry favor at the expense of others. Nor are we persuaded by PDS's argument that we should regard Webb's self-inculpatory statements as unreliable because Webb made a reference to his predecessor at PDS engaging in similar actions. Webb's reference to his predecessor was fleeting at best and, instead of attempting to shift blame, Webb implicated himself in criminal conduct from the moment he became the photogram manager to the exclusion of all others.

For the same reasons, we reject PDS's claim that because Webb's statements were procured either by law enforcement agents or by the informant, the presumption of unreliability cannot be rebutted. This argument is premised upon the plurality's statement in *Lilly* that "it is highly unlikely that the presumptive unreliability *that attaches to accomplices' confessions that shift or spread blame* can be effectively rebutted when . . . the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing." *Lilly,* 527 U.S. at 137 (emphasis added). Relying upon this statement, PDS argues that an accomplice's hearsay statement cannot be admitted against a defendant whenever the government has been involved in the production of the statement. We do not read *Lilly* so broadly, nor are we inclined to adopt such an all-encompassing rule of exclusion. Webb's selfinculpatory statements, although made to law enforcement agents and

the agents' informant, made no attempt to "shift or spread blame" to another.

In summary, Webb's statements are not analogous to those statements made by a defendant who seeks to shift blame to another for conduct in which the two were involved, thereby calling the reliability of the statements about his co-defendant into question.[1] In such cases," the danger against which the Confrontation Clause was erected -- the conviction of a defendant based, at least in part, on presumptively unreliable evidence -- " is present. *Lee,* 476 U.S. at 543. Here, Webb's statements are not fairly characterized as presumptively unreliable and bore sufficient "indicia of reliability" to be admissible against his employer. Because Webb's self-inculpatory admissions to the agents are among those statements which carry "particularized guarantees of trustworthiness," they were properly admissible under the Confrontation Clause. Accordingly, the district court did not err in admitting Webb's statements against PDS under Rule 801(d)(2)(D), and did not violate PDS's rights under the Confrontation Clause in doing so.

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[1] PDS also claims that Webb made the statements in a setting that Webb perceived to be coercive, possibly creating an incentive for Webb to tell the agents what he may have thought they wanted to hear to get them to leave. Webb and PDS, of course, failed to substantiate the claim that Webb's interview by the two agents in his home was "coercive" in nature, and even Webb never claimed that he proceeded to make selfinculpatory statements just to get the agents to leave.

III. Mail Fraud Convictions

A.

Appellants challenge their convictions for mail fraud under 18 U.S.C.A. § 1341, asserting (1) that Congress did not intend for the mail fraud statute to apply to mailings placed with private or commercial interstate carriers for the purpose of executing a fraudulent scheme if the mailing itself only actually travels intrastate, and (2) that if the statute is interpreted otherwise, the statute exceeds Congress's power under the Commerce Clause.

The mail fraud statute provides in pertinent part that:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, *places in any post office or authorized depositor for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing what ever to be sent or delivered by any private or commercial interstate carrier*, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C.A. § 1341 (emphasis added).

In this case, the fraudulent invoices prepared by PDS on the VDOT jobs were always mailed from PDS's offices in Virginia to VDOT's prime contractors in Virginia through

either the United States Postal Service or the United Parcel Service ("UPS"). Although the government was unable to present evidence as to which carrier was used for any particular invoice or that any particular invoice actually crossed state lines in route from PDS to the prime contractor, it did successfully prove that one of these interstate carriers (the Postal Service or UPS) was always used to execute the fraudulent overbilling scheme.[2] The district court concluded that the jurisdictional requirement of the mail fraud statute was satisfied because UPS was a commercial interstate carrier and that, although the government could not establish that the invoices deposited for delivery with UPS actually traveled interstate, such was not required. We agree.

1.

We first address Appellants' assertion that Congress did not intend for the "private or commercial interstate carrier" provision to extend coverage of the mail fraud statute to the use of interstate carriers when the item deposited for delivery to further the fraudulent scheme actually travels only intrastate. Specifically, they assert that the language of § 1341 is ambiguous as to the question of whether it applies to intrastate deliveries of matters or things deposited with a private or commercial interstate carrier, or only to matters or things delivered interstate, that the legislative history counsels that we adopt the more narrow construction, and that as a last resort we should apply the rule of lenity to overturn their convictions.

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[2] Relevant to this issue, the jury was instructed that to convict of mail fraud, it must find "beyond a reasonable doubt that the use of the mails or the interstate commercial carrier furthered or advanced or carried out in some way the scheme or plan to defraud or to obtain money or property by means of fraudulent representations," and also that "an interstate commercial carrier is a carrier . . . engaged in transporting persons or property across state lines." J.A. 556-57.

Our first step in analyzing the meaning of the statute is to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). "If the language is plain and the statutory scheme is coherent and consistent, we need not inquire further." *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 603 (4th Cir. 1999) (internal quotation marks omitted), *cert. denied*, 528 U.S. 1117, 120 S. Ct. 936, 145 L. Ed. 2d 814 (2000). "The plainness or ambiguity of the statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson,* 519 U.S. at 341. As a general rule, only "if the statutory language is ambiguous [do] we look beyond the language of the statute to the legislative history for guidance." *Holland,* 181 F.3d at 603 (internal quotation marks omitted). And, then, "if congressional intent is not apparent from an examination of the legislative history, we apply the traditional tools of statutory construction." *Id.* (internal quotation marks omitted).

Prior to 1994, the mail fraud statute criminalized the use of the United States Postal Service to execute a fraudulent scheme, but had no application to private or commercial interstate carriers. *See United States v. Lefkowitz,* 125 F.3d 608, 617 (8th Cir. 1997). Then, as now, the statute made no distinction between intrastate and interstate mailings, and it had been extended to both as a proper exercise of the Postal Power. *See United States v. Elliott,* 89 F.3d 1360, 1364 (8th Cir. 1996) (holding that "the jurisdictional basis of the mail fraud statute is grounded in the Postal Power and therefore necessarily encompasses all items passing through the United States mails, even if their passage is purely intrastate").

In 1994, however, Congress broadened the application of the mail fraud statute to also criminalize "depositing or causing to be deposited any matter or thing whatever to be sent or delivered by any *private or commercial interstate carrier*" for the purpose of carrying out a scheme or artifice to defraud. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087 (1994) (emphasis added). Although the amendment was added pursuant to the Commerce Clause power, and was obviously intended to extend the mail fraud statute to reach those defendants who use commercial interstate carriers such as UPS and Federal Express in lieu of the United States Postal Service, Congress added no distinction which would serve to exempt from the statute's intended reach intrastate mailings handled by such private or commercial interstate carriers.

We believe that the unambiguous language of current § 1341 criminalizes all mailings in furtherance of a fraudulent scheme if the mailings are placed with either the United States Postal Service or with other private or commercial mail delivery services which operate interstate, regardless of whether any particular mailing actually crosses state lines. Had Congress intended to criminalize only interstate deliveries by such interstate private or commercial carriers, and thereby create a different jurisdictional requirement when such carriers are used in lieu of the United States Postal Service, it could easily have done so. For example, the drafters need only have inserted the words "interstate" or "across state lines" immediately after the phrase "sent or delivered." Instead, Congress elected to use virtually identical language as that dealing with the use of the United States mail; *i.e.*, imposing criminal liability when one "places in any post office or authorized depository for mail matter, *any matter or thing whatever to be sent or delivered by the Postal Service*, or deposits or causes to be deposited

any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier" for the purpose of executing the scheme to defraud. 18 U.S.C.A. § 1341. (emphasis added). Consequently, we find no indication that Congress, in amending a statute which criminalizes depositing things with the United States Postal Service for delivery, interstate or intrastate, intended to limit the extension to private and commercial interstate carriers for only interstate deliveries. On the contrary, we think it obvious that Congress intended to prohibit the use of private and commercial interstate carriers to further fraudulent activity in the same way such use of the United States mail had long been prohibited.

Although we discern no ambiguity in congressional intent to criminalize such conduct, we are also unpersuaded by Appellants' assertion that the legislative history of the 1994 amendment indicates that Congress did not intend to extend the reach of the mail fraud statute to situations in which a private or commercial interstate carrier delivers the particular mailing only intrastate. Courts are to "venture beyond the plain meaning of a statute only in those rare instances in which there is 'a clearly expressed legislative intent to the contrary.'" *Holland,* 181 F.3d at 603 n.2 (quoting *Russello v. United States,* 464 U.S. 16, 20, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)). Although Appellants argue that references were made in the legislative history to increased interstate deliveries by facilities other than the United States Postal Service as a reason to amend the statute, they candidly acknowledge that the legislative history is silent regarding whether the amendment was intended to be applicable only to interstate deliveries by such private and commercial interstate carriers.

For similar reasons, we reject Appellants' argument that we should apply the rule of lenity to overturn the mail fraud convictions. The rule of lenity generally calls for courts to

construe ambiguous criminal statutes against the government and in favor of the defendant. *See United States v. Hall,* 972 F.2d 67, 69 (4th Cir. 1992) ("Under the rule of lenity any criminal statute . . . must be construed in favor of the accused and against the government if it is ambiguous"). However, "a provision is [not] 'ambiguous for purposes of lenity merely because it [is] *possible* to articulate a construction more narrow than that urged by the Government.'" *See United States v. Ehsan,* 163 F.3d 855, 857 (4th Cir. 1998) (alterations in original) (quoting *Moskal v. United States,* 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990). And, "the simple existence of some statutory ambiguity . . . is not sufficient to warrant application of the rule, for most statutes are ambiguous to some degree." *Muscarello v. United States,* 524 U.S. 125, 138, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998). "Rather, there must be a 'grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized everything from which aid can be derived, it is still left with an ambiguous statute.'" *Ehsan,* 163 F.3d at 858 (alteration in original) (quoting *Chapman v. United States,* 500 U.S. 453, 463, S. Ct. 1919, 114 L. Ed. 2d 524 111 (1991). Because we conclude that the meaning of § 1341 is unambiguous, the rule of lenity is inapplicable. The statute prohibits the act of depositing or causing to be deposited any matter or thing to be delivered by the Postal Service or by any private or commercial interstate carrier for the purpose of executing a scheme or artifice to defraud, irrespective of whether the matter or thing deposited for delivery is intended to or actually does travel interstate or intrastate.

2.

Having determined that the mail fraud statute applies to the use of private and commercial interstate carriers to execute a fraudulent scheme, regardless of whether the

particular matter deposited for delivery actually travels across state lines, we turn to the question of whether the mail fraud statute, when applied to the use of a private or commercial interstate carrier employed solely to deliver an item intrastate, is a permissible exercise by Congress of its power under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3 ("Congress shall have the Power . . . To regulate Commerce . . . among the several States. . . .").

In *United States v. Lopez,* 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), the Supreme Court identified three broad categories of activity that Congress may regulate under its commerce power. "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.,* those activities that substantially affect interstate commerce." *Id.* at 558-59 (citations omitted). The district court concluded that the 1994 amendment to the mail fraud statute to encompass private and commercial interstate carriers was a permissible exercise of Congress's authority under the second *Lopez* category, *i.e.*, the authority to regulate instrumentalities of interstate commerce. We agree.

Private and commercial interstate carriers are facilities or instrumentalities of interstate commerce, which Congress can regulate and protect from harm, "even though the [particular] threat may come only from [an] intrastate activity." *Lopez,* 514 U.S. at 558; *cf. Houston, E. & W. T. R. Co. v. United States,* 234 U.S. 342, 351, 34 S. Ct. 833, 58 L. Ed. 1341 (1914) (noting that Congress's authority to protect and advance interstate commerce extends to interstate carriers as instruments of interstate commerce:

"the fact that carriers are instruments of intrastate commerce, as well as interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care."); *Southern Ry. Co. v. United States,* 222 U.S. 20, 27, 32 S. Ct. 2, 56 L. Ed. 72 (1911) (noting that railroads "are highways of both interstate and intrastate commerce" and that the Safety Appliance Act may be made applicable to all railway vehicles, even those used only in intrastate commerce, under Congress's plenary power to regulate interstate commerce). Thus, when Congress acts to regulate or protect an instrumentality of interstate commerce under the second *Lopez* category, "federal jurisdiction is supplied by the nature of the instrumentality or facility used, not by separate proof of interstate movement," and "federal jurisdiction based on *intra* state use of *inter* state facilities is an appropriate exercise of the commerce power." *United States v. Marek,* 238 F.3d 310, 317 (5th Cir. 2001) (footnotes omitted), *petition for cert. filed,* 69 U.S.L.W. 3673 (U.S. Apr. 4, 2001) (No. 00-1526).

In *Marek,* a defendant's intrastate use of Western Union, an instrumentality of interstate commerce, to transfer payment to a hit man was found to be sufficient to permit the court to exercise jurisdiction under the federal murder-for-hire statute, 18 U.S.C.A. § 1958 (West 2000), even though the wire transfer was initiated in Houston, Texas and received in Harlingen, Texas, and the government introduced no evidence that the transmission ever actually crossed the Texas state line en route between the two points. After determining that the language of the statute applied to such intrastate uses of interstate instrumentalities, the court concluded that the statute was also a permissible exercise of

Congress's power under the Commerce Clause. As support, the court endorsed the similar conclusion reached by the district court in this case with respect to the 1994 amendment to the mail fraud statute:

> Through passage of a 1994 amendment to the federal mail fraud statute, Congress expanded 18 U.S.C. § 1341 to reach private interstate commercial carriers, such as Emery, DHL, and Federal Express, in addition to the U.S. Postal Service. Although no circuit court has addressed whether that amendment requires the crossing of state lines to establish jurisdiction, one district court recently held that the amended statute does cover "purely intrastate delivery of mails by private or commercial carriers as long as those carriers engage in interstate deliveries. . . . While jurisdiction lies only under the Commerce Clause for the use of private or commercial carriers, Congress may still regulate their intrastate activities because they are instrumentalities of interstate commerce." Here again, the conclusion is appropriate because intrastate use of interstate facilities is properly regulated under Congress's second-category *Lopez* power.

Marek, 238 F.3d at 318 (footnote omitted) (quoting *Photogrammetric Data Services*, 103 F. Supp. 2d at 882).

Other courts have reached similar conclusions, upholding convictions based upon criminal statutes which serve to protect instrumentalities of interstate commerce even though the specific conduct involved arose from intrastate activities. For example, in *United States v. Baker*, 82 F.3d 273 (8th Cir. 1996), the Eighth Circuit upheld the conviction of a police officer under the Travel Act, *see* 18 U.S.C.A. § 1952(a) (West 2000), premised upon extortion activity in which the officer escorted his victim, a man he had arrested, to an automatic teller machine to withdraw money in return for being released from custody. Because

an interstate network of automatic teller machines is a facility in interstate commerce, the court held, it falls within the second prong of *Lopez*, subject to regulation even though the withdrawal in question triggered an entirely intrastate electronic transfer. *See id.* at 275-76. Similarly, in *United States v. Gilbert,* 181 F.3d 152 (1st Cir. 1999), the court upheld a conviction under 18 U.S.C.A. § 844(e) (West 2000), premised upon the use of a telephone to make a bomb threat, even though there was no evidence that the threat was routed through an interstate system. "Because a telephone is an instrumentality of interstate commerce," the court held, "this alone is a sufficient basis for jurisdiction based on interstate commerce." *Id.* at 158; *see also United States v. Heacock,* 31 F.3d 249, 255 (5th Cir. 1994) (holding that "whenever a person uses the United States Post Office to deposit, to transport, and to deliver parcels, money, or other material by means of the mail, that person clearly and unmistakably has used a 'facility in interstate commerce,' irrespective of the intrastate destination of the item mailed," and that such intrastate use satisfies the jurisdictional requirement of the Travel Act); *United States v. Clayton,* 108 F.3d 1114, 1117 (9th Cir. 1997) (holding that because cellular telephones and cellphone ID numbers are instrumentalities of interstate commerce, protectable under the second category of *Lopez*, no further inquiry was necessary to sustain conviction under 18 U.S.C.A. § 1029(a) (West 2000)); *United States v. Kunzman,* 54 F.3d 1522, 1527 (10th Cir. 1995) ("As long as the instrumentality used is itself an integral part of an interstate system,

Congress may regulate intrastate activities involving the use of the instrumentality. . . .")[3]

In its current form, the mail fraud statute prohibits one from "depositing or causing to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier" for the purpose of executing a scheme or artifice to defraud. 18 U.S.C.A. § 1341. As such, it too constitutes a permissible exercise of Congress's power to protect interstate facilities from being utilized to accomplish fraudulent goals.

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[3] We pause briefly to address Appellants' suggestion that Congress intended the mail fraud statute, like the wire fraud statute, to be a regulation of the "use of channels of interstate commerce" under the first *Lopez* category and, therefore, that we should look to the wire fraud statute, which requires proof that a wiring actually crossed state lines, for guidance in interpreting the mail fraud statute. See e.g., *United States v. Darby*, 37 F.3d 1059, 1067 (4th Cir. 1994) (holding that "while the Government was required to prove that [the defendant]'s phone call crossed a state line . . ., the Government did not need to prove that [the defendant] knew of the interstate nexus.").

In contrast to the mail fraud statute, the wire fraud statute criminalizes a communication in interstate commerce, providing that it is a crime to "transmit or cause to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing [a] scheme or artifice" to defraud, 18 U.S.C.A. § 1343 (West 2000) (emphasis added), whereas the mail fraud statute criminalizes the act of depositing or causing to be deposited "any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier," 18 U.S.C.A. § 1341. In other words, the language of the wire fraud statute requires that a communication actually travel "in interstate or foreign commerce," whereas the language of the mail fraud statute requires only that a mailing be deposited with an "interstate carrier." Given these significant textual differences, we do not find the wire fraud statute to be helpful to our inquiry.

3.

Because we find the language of the mail fraud statute to be unambiguous, and that Congress's authority under the Commerce Clause extends to protect the instrumentalities of interstate commerce from being used to further fraudulent activity even if the use itself is purely intrastate, the rule of constitutional doubt raised by Appellants is likewise inapplicable. As Appellants note, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States,* 529 U.S. 848, 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 (2000) (internal quotation marks omitted). However, we do not view the language of § 1341 as susceptible to the construction advanced by Appellants, at least not without considerable strain; nor do we discern a "grave and doubtful constitutional question" to arise from the construction we have settled on. *Id.*

We are similarly unpersuaded by Appellants' suggestion that Congress's decision to protect private and interstate commercial carriers, in addition to the United States Postal Service, from being utilized to further fraudulent schemes where the use itself is intrastate, runs afoul of the respected federal-state balance. *See e.g., id.* at 858 (holding that application of federal arson statute to a private home would federalize a typically state crime and, thereby, "significantly change the federal-state balance in the prosecution of crimes") (internal quotation marks omitted); *United States v. Bass,* 404 U.S. 336, 349, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971) (noting policy that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States."). The mail fraud statute prohibits use of the United States Postal Service and

other private or commercial *interstate* carriers to further a fraudulent scheme; it does not attempt to criminalize such injurious *intrastate* use of a private or commercial *intrastate* carrier or delivery service.

4.

To conclude, we hold that the mail fraud statute criminalizes the use of private and commercial interstate carriers to execute fraudulent schemes to the same extent that the statute criminalizes such use of the United States mail. The jurisdictional element of the mail fraud statute is satisfied by defendant's act of depositing the matter or thing with a private or commercial interstate carrier, even though the delivery may be only intrastate. We also hold that criminalizing such conduct is a permissible exercise of Congress's power under the Commerce Clause to protect private and commercial interstate carriers from the burdens of being used to execute fraudulent schemes.

B.

Appellants also challenge their mail fraud convictions on the grounds that the district court's mail fraud instruction impermissibly broadened the charges in the indictment. Specifically, Appellants assert that the district court erred in failing to instruct the jury that it must find that the four invoices specified in the indictment were delivered by mail or interstate carrier *and* that they were false or fraudulent. This failure, Appellants assert, broadened the possible bases for conviction beyond the grounds alleged in the indictment, thereby constructively amending the indictment and constituting error *per se*. *See e.g., United States v. Randall,* 171 F.3d 195, 203 (4th Cir. 1999), *cert. denied*, 531 U.S. 906, 121 S. Ct. 248, 148 L. Ed. 2d 179 (2000); *United States v. Floresca,* 38 F.3d 706, 710 (4th Cir. 1994) (en banc). We disagree.

The indictment charged Appellants with four counts of mail fraud. After describing the scheme to defraud, the indictment goes on to identify four specific dates on which the Appellants deposited four specific invoices for delivery by mail or interstate commerce carrier "for the purpose of executing and attempting to" execute the scheme to defraud. J.A. 47. The indictment did not charge that the four individual invoices sent by mail or interstate carrier were themselves false or fraudulent, but rather only that the over-billing scheme was false and fraudulent and that the mailings were in furtherance of the scheme. Nor does the mail fraud statute require such a charge.

It is well-settled that a conviction for mail fraud requires a showing of (1) knowing participation in a scheme to defraud, and (2) a mailing in furtherance of the scheme. *See United States v. Dozie,* 27 F.3d 95, 97 (4th Cir. 1994) (per curiam). The use of the mails, however, need not be an essential element of the scheme to be part of the execution of the fraud. Rather, it need only "be incident to an essential part of the scheme or a step in the plot." *Schmuck v. United States,* 489 U.S. 705, 710-11, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989) (internal citations and quotation marks omitted). Accordingly, Appellants' mail fraud convictions did not require the government to prove that the four invoices referenced in the indictment were false or fraudulent, but only that they were placed in the mails in furtherance of the fraudulent scheme. *See id.* at 715 (noting that "'innocent' mailings -- ones that contain no false information -- may supply the mailing element").

Also, while the district court's standard mail fraud instruction did not specifically refer to the invoices set forth in the indictment, the indictment provided to the jury clearly referenced and described the four invoices which served as the basis for the four separate mail fraud counts and identified each as a separate count, and the jury was

instructed that it must consider each alleged offense or count separately. The court also instructed the jury that it must determine that the Appellants used the mails or an interstate commercial carrier to advance the scheme to defraud, and that the government must prove that the mails or an interstate commercial carrier were used in some manner to further, advance, or carry out the scheme to defraud. We conclude that the district court's instruction did not unconstitutionally broaden the charges in the indictment.

IV. Highway Fraud Convictions

Appellants also assert that their convictions for highway fraud under 18 U.S.C.A. § 1020 must be reversed because the government failed to prove that they acted willfully, failed to establish that the relevant highway projects were approved by the Secretary of Transportation or a properly authorized delegee of the Secretary, and failed to prove that the false invoices were made in connection with the construction of a highway project. We address each claim in turn.

A.

We begin with Appellants' contention that willfulness is an essential element of a § 1020 conviction which the government failed to establish. The district court refused Appellants' proffered charge to this effect, instructing the jury instead that it must find that the Appellants made false statements knowingly.

The highway fraud provision, 18 U.S.C.A. § 1020, provides in pertinent part that "whoever . . . *knowingly* makes any false statement, false representation, false report, or false claim with respect to the . . . cost of any work performed or to be performed . . . in connection with the construction of any highway or related project approved by

the Secretary of Transportation . . . shall be fined under this title or imprisoned not more than five years, or both." *Id.* (emphasis added). Thus, the language of the statute requires that a false statement be made knowingly in order to convict, but includes no element of willfulness. Appellants acknowledge as much. However, they contend that we should read an element of willfulness into the statute, primarily because the Federal Highway Administration ("FHWA"), in federal regulation 23 C.F.R. § 633, subpt. C, App. P 5 (1999), has done so.

The FHWA is charged with authorizing federal-aid highway projects. Under Subpart C of the regulation, highway construction contracts under the direct supervision of the FHWA must incorporate a form containing various labor standards provisions set forth in its Appendix A. This form, in turn, includes a provision which reminds contractors that they should "perform their functions as carefully, thoroughly, and honestly as possible," and advises contractors that "willful falsification, distortion, or misrepresentation with respect to any facts related to the project is a violation of Federal law." *Id.* Based upon this, Appellants assert that we should defer to the FHWA's interpretation of § 1020 and also read into § 1020 an element of willfulness. We decline to do so.

For reasons unknown to us, the FHWA requires that the language in its direct construction contracts notify contractors that willfully false statements are a violation of federal law. However, even were we to determine that this reference in the Appendix fairly represents an agency's interpretation of the statute as requiring willfulness in order to convict a contractor of highway project fraud (which we do not), we would owe that interpretation no deference. The text of the statute is unambiguous on this point and the FHWA is not charged with nor granted the authority to interpret or implement § 1020. Consequently, the

department's regulation has no effect on how we must interpret the statute. *See e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). In summary, we decline to read an element of "willfulness" into the plain and unambiguous text of § 1020.[4] The government was not required to prove "willfulness" to convict Appellants under 18 U.S.C.A. § 1020 and, accordingly, the district court did not err in refusing Appellants' proposed instruction to the contrary.

B.

We next turn to Appellants' assertion that the government failed to prove that the false claims were submitted in connection with a "highway or related project approved by the Secretary of Transportation," 18 U.S.C.A. § 1020, or a properly-authorized delegee of the Secretary, *see* 49 U.S.C.A. § 322(b) (West 1997) (providing that the Secretary of Transportation "may delegate, and authorize successive delegations of, duties and powers of the Secretary to an officer or employee of the Department" and that an officer may in turn "delegate, and authorize successive delegations of, duties and powers of the officer to another officer or employee of the Department").

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[4] Appellants also rely upon a single district court case involving alleged highway fraud under § 1020, in which the court posed the pertinent question for the jury as "whether the government has proved beyond a reasonable doubt that that particular defendant has . .. knowingly and *willfully* by a false statement defrauded the government of the United States with a *specific intent* and purpose of accomplishing a fraud against the United States." *United States v. Molin*, 244 F. Supp. 1015, 1017 (D. Mass. 1965) (emphasis added). The *Molin* case, however, is comprised of nothing more than the court's publication of its jury charge in a § 1020 case which also for unexplained reasons wrote a willfulness requirement into the unambiguous text of § 1020. For the reasons stated, we find this to be improper.

Appellants assert that their convictions must be reversed because there is no evidence that the Secretary delegated his duty to approve the projects in this case to a natural person. *See Halverson v. Slater,* 327 U.S. App. D.C. 97, 129 F.3d 180, 185-86 (D.C. Cir. 1997) (holding that the Secretary may only delegate the powers and duties of the office to a natural person, not to an "administration" or entity other than a natural person). However, at trial, Mr. John Grounds testified that he had been employed by the FHWA for 27 years and had been the financial manager with the FHWA office in Richmond, Virginia, for the past 10 years. He testified that he was authorized on behalf of the Secretary of Transportation to commit the federal funds to pay VDOT for highway projects. There was no evidence presented to dispute Grounds' testimony that he was authorized to approve the relevant highway projects for federal funding. And, Appellants did not challenge at trial his testimony in this regard. Accordingly, we conclude that there was sufficient evidence to support the jury's determination that the false claims submitted by Appellants were submitted in connection with highway projects approved by an authorized delegee of the Secretary of Transportation.

C.

Finally, Appellants contend that we should reverse their highway fraud convictions because the government failed to prove that the false statements were made "in connection with the construction of [a] highway or related project." 18 U.S.C.A. § 1020. We disagree.

The highway fraud provision, in separate paragraphs, criminalizes the making of false statements in connection with highway projects "submitted for approval to the Secretary" and highway projects "approved by the Secretary":

Whoever . . . knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be per formed, or the costs thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction of *any highway or related project submitted for approval to the Secretary of Transportation*; or

Whoever knowingly makes any false statement, false representation, false report, or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of *any highway or related project approved by the Secretary of Transportation*;

18 U.S.C.A. § 1020 (emphasis added), is guilty of highway project fraud.

Appellants were indicted under the second paragraph of § 1020 for their submission of false invoices in connection with the construction of highway projects *already approved* by the Secretary's delegee. Appellants assert, however, that the second paragraph is only applicable to activities associated with actual construction of the highway, and not to preliminary engineering contracts such as that performed by PDS. In other words, Appellants assert that their convictions must be reversed because the second paragraph does not apply to the preliminary engineering work they performed.

We do not read the second paragraph of § 1020 so narrowly. The first paragraph of § 1020 pertains to "false statements, false representations, or false reports" made "in connection with the submission of plans, maps, specifications, contracts, or costs of construction of any highway or related project *submitted for approval* to the

Secretary of Transportation," whereas the second paragraph of § 1020 pertains to "false statements, false representations, false reports, or *false claims*" made "in connection with the construction of any highway or related project *approved* by the Secretary of Transportation." *Id.* (emphasis added). Contrary to Appellants' proffered interpretation, we do not read the two paragraphs as seeking to distinguish between types of contracts (preliminary engineering contracts for a construction project as opposed to contracts for "actual" construction), but rather as seeking to distinguish between statements made in connection with a highway or related project submitted for approval and statements (including "claims") made in connection with a highway or related project already approved. Under Appellants' strained reading, their services, although performed in connection with an approved highway project, would fall within a gap between the two paragraphs. No such gap exists. Although in the nature of preliminary engineering work, the work of Appellants was furnished in connection with the construction of a highway project approved by the Secretary of Transportation through an authorized delegee.

V. Sentencing

The district court sentenced PDS concurrently on each count of conviction to one year of probation, a fine of $522,045.29, and restitution of $435,038.33. Webb was sentenced concurrently on each count to 24 months imprisonment, two years of supervised release, and restitution of $435,038.33. The sentences were based upon a calculated loss of $435,038.33 to the victim VDOT as a result of the overbilling scheme. This amount, which resulted in a nine-level increase in the applicable offense level, *see* U.S. Sentencing Guidelines Manual § 2F1.1(b)(1)(J) (1998), was consistent with the admissions of Webb, who had estimated an inflation of ten to fifteen percent per job, or $100,000 to $200,000 per year for five

years, and with PDS records reviewed by the investigating agent, which indicated that ten percent of the VDOT jobs for the years at issue totaled just over $452,000.

Appellants assert that the district court improperly based their sentences upon this calculated loss. They contend that the court should have instead calculated their sentences based solely on the loss reflected by the individual invoices listed in the indictment, which they calculate at $ 19,008 and which would have resulted in only a three-level increase in the applicable offense level. *See* U.S.S.G. § 2F1.1(b)(1)(D). By employing the loss calculation called for by the guidelines, Appellants assert, the loss calculation became the "tail which wags the dog of the substantive offense," in violation of their due process rights as interpreted under *McMillan v. Pennsylvania,* 477 U.S. 79, 88, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986). In the alternative, Appellants assert that the amount of loss was an essential element of the offenses of conviction not proven beyond a reasonable doubt, requiring that their sentences be reversed in light of the Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). They seek a remand for resentencing based upon the amount of loss reflected by the invoices listed in the indictment. Although the Supreme Court decision in *Apprendi* was issued three days after sentencing in this case, the Appellants raised the due process challenge as a *McMillan* issue before the district court. Accordingly, we review the matter de novo.

The Due Process Clause of the Fifth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In *McMillan,* the Supreme Court found constitutional a statute that imposed a mandatory minimum

sentence for a defendant who is convicted of specified felonies when a judge finds by a preponderance of the evidence that the defendant "'visibly possessed a firearm.'" 477 U.S. at 81. Because the statute "neither altered the maximum penalty for the crime committed nor created a separate offense calling for a separate penalty," *id.* at 87-88, the Court reasoned that the statute merely "limited the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm," *id.* at 88. Thus, the statute merely raised the minimum sentence that could be imposed within the permissible statutory range; it was not "tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.*

In *Apprendi*, however, the Court held that the imposition of a sentence in excess of a maximum statutory sentence allowable for an offense, based upon a separate statute allowing for the increase if the sentencing court determined by a preponderance of the evidence that the offense was committed with a racially biased purpose, did violate the defendant's due process rights. Specifically, the Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). But, contrary to Appellants' assertion that *Apprendi* effectively strips *McMillan* of any meaningful vitality and counsels that we require *all facts* that expose a defendant to a sentencing range, whether by statute or by the guidelines, to be proven to a jury beyond a reasonable doubt, the *Apprendi* Court expressly noted that *McMillan* remains good law, albeit limited to cases "that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict -- a limitation identified in the *McMillan* opinion itself."

Apprendi, 530 U.S. at 487 n.13; *see also id.* at 495 ("When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as "a tail which wags the dog of the substantive offense." (quoting *McMillan,* 477 U.S. at 88)).

In this case, it is undisputed that the fines and terms of imprisonment imposed upon the Appellants were within the statutory maximums allowed for the offenses for which Appellants were convicted. Consequently, we are not dealing with the imposition of a sentence by a district court which exceeds the applicable statutory maximum. Rather, we are presented with the question of whether facts that serve to increase the defendant's sentence within the maximum sentence authorized by the statute, pursuant to application of the Sentencing Guidelines, must be charged in the indictment and proven to the jury beyond a reasonable doubt. We believe that Appellants' argument in this regard is foreclosed by the Court's holding in *McMillan*, which remains good law, and by our recent decision in *United States v. Kinter,* 235 F.3d 192, 201 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1393, 149 L. Ed. 2d 316 (2001). In *Kinter*, we held that the "the relevant 'maximum' [sentence] under *Apprendi* is found on the face of the statute rather than in the Sentencing Guidelines," *id.* at 201, and that where the sentences imposed by the sentencing court pursuant to the guidelines are less than the maximum permitted by the statute for the offense for which the defendants were convicted, the factual determinations which increased the defendants' sentences under the applicable guidelines do not run afoul of the due process concerns raised by *Apprendi*, *see Kinter*, 235 F.3d at 198-202 (rejecting due process challenge to district court's findings that increased the sentencing range from ten months to 46 to 57 months). *See* also *United States v. Obi,* 239 F.3d 662, 667 (4th Cir. 2001),

petition for cert. filed, U.S.L.W. (U.S. May 8, 2001) (No. 00-9843) (rejecting claim that sentencing based upon drug quantity found by a preponderance of the evidence under the guidelines offends the principles set forth in *Apprendi*).

Nor do we view the sentencing factors based upon additional losses associated with the submission of false invoices in the case before us today as so great or disproportionate as to otherwise implicate due process concerns reserved by *McMillan*; *i.e.*, that sentencing factors, including those that affect the sentencing range within the statutory maximum, should not be permitted to be found by a preponderance of the evidence in the extraordinary case where the factors can be said to be the "tail which wags the dog of the substantive offense." *McMillan,* 477 U.S. at 88. In *United States v. Watts,* 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997), the Supreme Court reiterated *McMillan's* holding "that application of the preponderance standard at sentencing generally satisfies due process," but recognized the "divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase a sentence must be based on clear and convincing evidence." *Watts,* 519 U.S. at 156. However, the Court held that the guideline application, which resulted in an increase in the sentencing range from 15-21 months to 27-33 months, did not present an "exceptional circumstance" as contemplated by *McMillan. Watts,* 519 U.S. at 156-57. Nor does the case before us today. *See e.g., United States v. Fenner,* 147 F.3d 360, 366 (4th Cir. 1998) (rejecting argument that increases from 42 years imprisonment to 55 years imprisonment for one defendant and from 115 months imprisonment to 210 months imprisonment were "so profound that it is sufficient to implicate due process concerns or to give the impression of having been tailored to permit the application of [a]

cross-reference to be a tail which wags the dog of the substantive offense" (internal quotation marks omitted)); *United States v. Galloway,* 976 F.2d 414, 425-26 (8th Cir. 1992) (holding that a potential increase in a guideline range from 21-27 months to 63-78 months did not raise due process concerns); *cf. United States v. Lombard,* 72 F.3d 170, 186-87 (1st Cir. 1995) (holding that sentencing court may depart downward in an "extreme case" where the application of the § 2K2.1(c)(1)(B) cross-reference to account for a murder charge, of which defendant was acquitted in state court, raised the guideline range from 262-327 months to a mandatory life sentence, but distinguishing "cases involving even sizable sentence increases based on an uncharged quantity of drugs . . . or any number of kindred sentence enhancements").

Because the sentences imposed upon the Appellants were within the statutory maximum sentences for commission of the offenses of conviction, and no other exceptional circumstances are apparent to counsel a different result, we hold that Appellants' constitutional rights were not offended by the loss calculation employed by the district court to impose the sentences at issue. Accordingly, we affirm the Appellants' sentences as well as their convictions.

VI. Conclusion

For the foregoing reasons, we affirm the Appellants' convictions and sentences.

AFFIRMED

CONCUR BY:

WILLIAMS (In Part)

CONCUR:

WILLIAMS, Circuit Judge, concurring in part and concurring in the judgment:

The majority concludes that the mail fraud statute, when applied to the use of a private or commercial interstate carrier employed solely to deliver an item intrastate, is a permissible exercise of Congress's Commerce Clause power under *Lopez's* second category. Because I believe that the constitutionality of the mail fraud statute more appropriately is sustained under *Lopez's* third category, I decline to join Section III A. 2-4 and write separately to explain my reasoning but concur in the remainder of the majority's opinion and in the judgment.

I.

In *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), the Supreme Court established three categories by which to evaluate Congress's exercise of its Commerce Clause power: Congress may (1) regulate the "use of the channels of interstate commerce"; or (2)"regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even when the threat may come only from intrastate activities"; or (3) regulate "activities that substantially affect interstate commerce." *Id.* at 558-59.

Using *Lopez's* second category, the majority concludes that the mail fraud statute is a regulation that protects private mail carriers, as instruments of interstate commerce, from harm. In so concluding, the majority interprets *Lopez's*

second category in a manner that allows Congress unbounded authority to legislate federal criminal laws that only incidentally involve instrumentalities of interstate commerce, which, in my opinion, leads to an untenable result. *See Gibbs v. Babbitt,* 214 F.3d 483, 490 (4th Cir. 2000) ("It is essential to our system of government that the commerce power not extend to effects on interstate commerce that are so remote that we would effectually obliterate the distinction between what is national and what is local." (internal quotation marks omitted)). Supreme Court precedent analyzing *Lopez's* second category does not necessitate the majority's broad interpretation of the category. For example, in the *Shreveport Rate Cases*, the seminal opinion involving *Lopez 's* second category, the Supreme Court affirmed Congress's power to regulate the instrumentalities' operations and the setting of varying rates and taxes by different states, noting the importance of direct regulation and protection of the instrumentalities of interstate commerce. *Houston, East & West Texas Ry. Co. v. United States (Shreveport Rate Cases),* 234 U.S. 342, 356-60, 34 S. Ct. 833, 58 L. Ed. 1341 (1914). Congress's ability to regulate and protect instrumentalities of interstate commerce stems from the underlying rationale that harm to the instrumentalities necessarily results in harm to interstate commerce generally. *See Southern Ry. Co. v. United States,* 222 U.S. 20, 26-27, 32 S. Ct. 2, 56 L. Ed. 72 (1911) (upholding amendment to Safety Appliance Act, 27 Stat. at L. 531, chap. 196, U.S. Comp. Stat. 1901, p. 3174, 32 Stat. at L. 943, chap. 976, U.S. Comp. Stat. Supp. 1909, p. 1143, which provided for all locomotives, cars, and similar vehicles used on any railway engaged in interstate commerce to be equipped with certain designated safety appliances, regardless of whether the vehicles were used in moving intrastate or interstate traffic); *Perez v. United States,* 402 U.S. 146, 155-156, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971) ("For example, the destruction of an aircraft (18

U.S.C. § 32), or . . . thefts from interstate shipments (18 U.S.C. § 659)"); *see also United States v. Cobb,* 144 F.3d 319, 321 & n.2 (4th Cir. 1998) (recognizing that the federal carjacking statute fell within *Lopez's* second category because the statute regulated harm to automobiles). This underlying purpose, however, is not served where, as here, the legislation simply prohibits illegal or immoral use of an instrumentality but does not directly or indirectly regulate the instrumentality to protect it from harm resulting from the improper useb.

Moreover, interpreting *Lopez's* second category to include all improper uses of an instrumentality conflates *Lopez's* second category with its first, which allows Congress to legislate to keep the channels of interstate commerce free from immoral or injurious uses. Because the mail fraud statute regulates the improper use of an instrumentality but in no way regulates and protects the instrumentality itself, I would hold that *Lopez's* second category is inapplicable. Instead, I would evaluate the mail fraud statute under *Lopez's* third category to determine whether the statute, as applied to PDS and Webb's intrastate activities, has a substantial effect on interstate commerce.

II.

To constitute a proper exercise of Congress' power over an intrastate activity under *Lopez's* third category, the regulated activity must "arise out of or [be] connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez,* 514 U.S. at 561; *see also United States v. Morrison,* 529 U.S. 598, 611, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) ("*Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has

been some sort of economic endeavor."). I have no difficulty concluding that the furtherance of schemes devised for the purpose of defrauding others can be viewed as economic activity within the meaning of *Lopez* and *Morrison*. *See Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000) ("Economic activity must be understood in broad terms."). Further, in the aggregate, the intrastate use of interstate carriers to further fraudulent schemes has a substantial harmful effect on interstate commerce.[5] Thus, I would hold that the mail fraud statute, as applied to PDS and Webb's intrastate activities, is constitutional because the fraudulent mailings have a substantial effect on interstate commerce.

III.

Because I believe that Congress did not intend the mail fraud statute to regulate and protect private and commercial interstate mail carriers as instrumentalities, I disagree with the majority's holding in Section III A. 2-4 that *Lopez's* second category renders the mail fraud statute constitutional under the Commerce Clause. Nevertheless, because the regulated activity at issue has a substantial effect on interstate commerce and is, therefore, a permissible exercise of Congress's Commerce Clause power under *Lopez's* third category, I concur in the judgment. I also concur in the remainder of the opinion.

DISPOSITION:

AFFIRMED.

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[5] This is illustrated by the fraudulent activity in this case, wherein PDS and Webb used their commercial relationship with VDOT to defraud prime contractors on VDOT projects, some of which involved federal highways.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

Criminal No. 99-471-A
103 F. Supp. 2d 875;
54 Fed. R. Evid. Serv. (Callaghan) 708

UNITED STATES OF AMERICA,
Plaintiff,
v.
PHOTOGRAMMETRIC DATA SERVICES, INC., and DAVID G. WEBB,
Defendants.

June 21, 2000, Decided

June 21, 2000, Filed

DISPOSITION:
All defendants' motions denied.

COUNSEL:
For PLAINTIFF: Jack Hanly, Assistant United States Attorney, United States Attorneys Office, Alexandria, VA.

For DEFENDANT: David F. Geneson, Esq., Hunton & Williams, Washington, DC.

For DEFENDANT: Laura A. Miller, Esq., Nixon Peabody LLP, Washington, DC.

JUDGES:
Leonie M. Brinkema, United States District Judge.

OPINION BY:
Leonie M. Brinkema

OPINION:

MEMORANDUM OPINION

Before the Court is the defendants' Joint Motion to Set Aside the Verdict and Enter an Order for Judgment of Acquittal or for a New Trial, and defendant Photogrammetric Data Services, Inc.'s Motion to Set Aside the Verdict on the Basis of Bruton v. United States, and Enter an Order for Judgment of Acquittal or a New Trial. For the reasons stated below, both motions will be denied.

I. Procedural History

Photogrammetric Data Services, Inc. ("PDS") is a Sterling, Virginia corporation in the business of preparing topographic maps from aerial photography and ground surveys for construction projects for various customers, including the Virginia Department of Transportation ("VDOT"). David G. Webb ("Webb") was the supervisor of the photogram department at PDS. On December 22, 1999, the United States filed an eight-count indictment against PDS and Webb, charging the defendants with Highway Project Fraud in violation of 18 U.S.C. § 1020, and Mail Fraud in violation of 18 U.S.C. § 1341. The indictment alleged in Counts 1-4 that PDS and Webb had knowingly made false statements, representations, and claims with

respect to the quantity and costs of work performed in connection with the construction of a highway project by submitting false invoices for payments covering labor for which the defendants knew they were not entitled because the hours had been artificially inflated. Counts 5-8 alleged that the defendants had knowingly devised a scheme and artifice to defraud VDOT and the Federal Highway Administration ("FHWA") and that the defendants had used the United States Postal Service and other interstate commercial carriers to further this scheme and artifice to defraud.

A four-day jury trial was held beginning on March 27, 2000. At the close of the government's case, the Court granted the defendants' Fed. R. Crim. P. 29(a) motion for judgment of acquittal as to Counts 2 and 6. The remaining Counts were submitted to the jury for deliberation, and the jury returned a verdict of guilty as to both defendants on Counts 1, 3, 5, 7, and 8, and a verdict of not guilty as to both defendants on Count 4. The defendants then timely filed the post-trial motions which are now before us.

II. Standard of Review

A jury verdict must be sustained if there is substantial evidence, when viewed in a light most favorable to the government, to support the verdict. See *United States v. Cummings*, 937 F.2d 941 (4th Cir. 1991) (citing *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942)). Thus, so long as a reasonable trier of fact could find that the evidence establishes the guilt of the defendants beyond a reasonable doubt, the verdict cannot be set aside. See *United States v. Rasco*, 123 F.3d 222, 228 (5th Cir. 1997).

III. Joint Motion to Set Aside Jury Verdict

The defendants have raised a number of arguments which they contend support their position that the verdict should be set aside. They argue that the government: (1) failed to allege and prove that the defendants made false statements in connection with a project approved by the Secretary of Transportation or an appropriately authorized delegee; (2) failed to prove that false statements were made in connection with a highway construction project, as required under 18 U.S.C. § 1020;[1] (3) failed to allege or establish a sufficient federal nexus to prosecute under § 1020; (4) failed to prove that the defendants acted with the specific intent to defraud, or with the requisite knowledge of the elements of the offense; (5) failed to demonstrate that the strictly interstate use of a private interstate carrier constitutes mail fraud; and (6) failed to prove that PDS invoices were delivered via United States mail or that Webb used the mail or caused the mails to be used. Additionally, the defendants have raised numerous arguments with respect to the jury instructions, suppression issues, and various other pre-trial rulings of the Court.

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[1] 18 U.S.C. § 1020 reads, in pertinent part:

"Whoever . . . knowingly makes any false statement, false representation or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of work to be performed, or the costs thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction of any highway or related project submitted for approval to the Secretary of Transportation;

or

Whoever knowingly makes any false statement, false representation, false report, or false claim with respect to the character, quality, quantity, or costs of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation" is guilty of a felony.

A. Approval By the Secretary of Transportation

Defendants argue that the jury verdicts as to Counts 1 and 3 should be set aside because the government neither alleged nor proved that the alleged false statements were made in connection with the construction of a project approved by the Secretary of Transportation. Specifically, they contend that the government submitted no proof that the Secretary of Transportation personally approved any of the highway projects that are the basis for the § 1020 violations alleged in Counts 1 and 3.

Although the defendants concede that the Secretary also has the power to delegate his authority,[2] they assert that the testimony of John Grounds, FHWA Financial Manager, was insufficient to establish that such a delegation had in fact been made, and no other testimony regarding this fact was elicited. The defendants point to Grounds' testimony that "we", *i.e.* FHWA, had been an authorized delegee of the Secretary of Transportation shows there was no legal delegation because § 322(b) allows only for delegation to an officer or employee, but not an agency. *See*, *Melrose Assoc. v. United States*, 43 Fed. Cl. 124 (Fed. Cl. 1999).

We find this argument unsupported by the record. Grounds testified that he had been an FHWA employee for 27 years, and had been Financial Manager for the last 10 years. Tr. 484-85. He indicated that when his office receives funding requests from VDOT, the requests are first screened by engineers before he signs off on them, thereby committing federal funds to the project. *Id.* at 486. He

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[2] The Secretary of Transportation "may delegate, and authorize successive delegations of, duties and powers of the Secretary to an officer or employee of the Department. An officer of the Department may delegate, and authorize successive delegations of, duties and powers of the officer to another officer or employee" of the Department. 49 U.S.C. § 332(b).

testified that he is authorized to do so by the Secretary of Transportation. *Id.* Although the defendants make much of the fact that Grounds could not identify the precise regulation under which his authority is granted, his testimony that he does, in fact, have this authority was otherwise uncontroverted. We are therefore satisfied that his testimony was sufficient to establish that the highway projects at issue in Counts 1 and 3 had the approval of the Secretary of Transportation.

B. Connection To A Highway Construction Project

Defendants assert that they should have been acquitted because the government did not prove that the alleged false statements were made "in connection with the construction of any highway or related project", as required under § 1020. They argue that the government did not charge the defendants under the first paragraph of § 1020 which pertain to the creation or "the submission of plans, maps, [and] specifications" for highway or related projects. Conversely, the defendants contend that the second paragraph, under which the defendants were charged, relates to false statements made in actual highway construction projects. Thus, because defendants' photogrammetric work fell squarely under the rubric of Preliminary Engineering work for projects which necessarily had not begun, defendants argue that no false statement was made in an actual highway or related project.

The Government correctly responds that defendants' reading of § 1020 is strained. Upon close inspection, it becomes obvious that the first paragraph of § 1020 enumerates submissions such as plans, maps, contracts, etc. because that paragraph prohibits the making of false statements in submissions made "for approval by the Secretary of Transportation." If the project has yet to be approved, such preliminary work as plans, maps, and

contracts are the only things in which a false statement could be made. Conversely, the second paragraph prohibits the making of false statements in submissions for projects "approved by the Secretary". Obviously, this paragraph encompasses all submission related to the project once it has been approved.

The assertion that the second paragraph is inapplicable to these defendants because the false statements were related to projects on which construction was never begun is unsupported. There is no requirement under § 1020 that the project, once approved, must move forward. The second paragraph of § 1020 is both retrospective and prospective in its sweep, prohibiting false statements concerning work "performed *or to be performed*, or materials furnished *or to be furnished*." Thus, paragraph two of the statute includes all false statements made after approval by the Secretary of Transportation; there is no requirement, as defendants would have us read into the statute, that the false statement be made in connection with an "actual" highway or related project. We find that the defendants were properly charged and convicted under the second paragraph of 18 U.S.C. § 1020 because the projects for which they made false statements had been approved by the Secretary of Transportation.

C. Lack of a Federal Nexus

Defendants next assert that the trial evidence does not establish a sufficient federal nexus to support a conviction under § 1020. In particular, they assert that no federal nexus exists because the government did not prove either the physical transport of an item in interstate commerce or that the challenged conduct had a substantial effect on interstate commerce, as required under *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995). Furthermore, the defendants contend that their

actions had no impact on any federal interest because under the Federal-Aid Highway Act, federal government contributions meant to defray state costs of highway construction are awarded in fixed sums, and therefore operate as strict ceilings which completely insulate the United States from any overcharges. See *United States v. Azzarelli Constr. Co.*, 647 F.2d 757 (7th Cir. 1981).

The government responds that both these arguments are without merit because the statute at issue in *Lopez* was struck down because it neither regulated an interstate commercial activity nor contained a requirement that the gun possession be connected in any way to interstate commerce. As the Court has recently clarified:

> The statute [in *Lopez* was defective because it] contained 'no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.' Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce.

United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 1750-51, 146 L. Ed. 2d 658 (2000) (quoting *Lopez, 514 U.S. at 562).* Because § 1020 contains, in the words of *Lopez,* a "jurisdictional element which would ensure, through case-by-case inquiry, that the [highway fraud] in question affects interstate commerce", then it does not run afoul of the Commerce Clause. *Lopez,* 514 U.S. at 561.

We agree with the government's position that approval by the Secretary of Transportation is the jurisdictional element sufficient to create a federal nexus under 18 U.S.C. § 1020. *Cf., e.g., United States v. Lindsay,* 184 F.3d 1138

(10th Cir. 1999) (reversing federal bank fraud conviction because government failed to prove that bank was FDIC insured, an essential jurisdictional element); *United States v. Schultz*, 17 F.3d 723 (5th Cir. 1994) (same).

Second, we find no merit in the claim that no federal nexus exists because the party which sustained the injury as a result of defendants' false statements was VDOT. Defendants assert that "nothing in the Constitution gives Congress the power to turn a possible crime strictly against Virginia into a federal felony." Br. at 11. This disingenuous argument fails to recognize that the federal government has a patently obvious interest in insuring that federal funds, once distributed, are properly administered. Thus, a false statement made in relation to a highway or related project, may fall within the ambit of § 1020:

even when it is not submitted to a federal agency directly and the federal agency's role is limited to financial support of a program it does not itself directly administer . . . the necessary link between deception of the non-federal agency and effect on the federal agency is provided by the federal agency's retention of the ultimate authority to see that the federal funds are properly spent.

United States v. Petullo, 709 F.2d 1178, 1180 (7th Cir. 1983) (citations omitted); see also, *United States v. Shafer*, 199 F.3d 826, 828-29 (6th Cir. 1999); *United States v. Gibson*, 881 F.2d 318 (6th Cir. 1989).[3]

Moreover, defendants' reliance on *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981), is unavailing, because that case dealt with a different statute, under the False Claims Act, 31 U.S.C. § 231, in a purely civil context. In *Azzarelli*, the Seventh Circuit found that the United States could not recover civil damages because it had suffered no actual injury in light of the fact that the Federal-Aid Highway Act awards a fixed amount to each state. *See id.* at 760-61. Our case is distinguishable from *Azzarelli* because the statute at issue, 18 U.S.C. § 1020, unlike the False Claims Act (which provides only a civil remedy), extends beyond claims for monetary remuneration by the United States to criminalize false representations made with respect to such things as the character, quantity, or quality of work done or materials used in a project receiving federal highway funds. Thus, Congress clearly intended to create a criminal cause of action not based solely upon fiscal loss. Perhaps more importantly, Congress has reacted negatively to the holding in *Azzarelli*:

The Senate Judiciary Committee made clear that it intended the concept of loss to the United States to be considered broadly. As the Committee noted, the Seventh Circuit had held in [*Azzarelli*] that there was no loss to the United States, and hence no viable False Claims Act suit, where

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[3] *Petullo*, *Schafer*, and *Gibson* are cases involving 18 U.S.C. § 1001. We are aware that jurisdiction is expressly conferred under § 1001 to include "the jurisdiction of the executive, legislative, or judicial branch of the government." Although § 1020 is not as explicit, it nevertheless implicates the authority delegated to the Federal Highway Administrator, who is expressly charged with administering the Federal-Aid Highway Act. *See* 49 C.F.R. § 1.48(c); 23 U.S.C. § 101, *et seq.*

the federal government had contributed a fixed sum to Illinois for highway projects and thus would have paid out the same amount regardless whether contractors submitted false claims to the State. The Committee made clear it disapproved of this result, and expressly 'intended the new subsection . . . to overrule *Azzarelli* and similar cases which have limited the ability of the United States to use the act to reach fraud perpetrated on federal grantees, contractors or other recipients of Federal funds.'

U.S. ex rel. Yesudian v. Howard University, 332 U.S. App. D.C. 56, 153 F.3d 731, 739 (D.C. Cir. 1998) (quoting S. Rep. No. 99-345, at 22 (1986)); see also *U.S. ex rel. Koch v. Koch Industries, Inc.*, 57 F. Supp. 2d 1122, 1128 (N.D. Okla. 1999). Accordingly, we find that there was a sufficient federal nexus to charge and convict these defendants under 18 U.S.C. § 1020.

D. Specific Intent

The defendants assert that the verdicts should be set aside as to Counts 1 and 3 because the government did not prove that they acted willfully or with a specific intent to defraud the United States, relying on 23 C.F.R. § 633, subpt. C, App. A P 5 (1999).[4] This issue was raised pre-trial when counsel for Webb renewed a motion to dismiss Counts 1-4 because the indictment failed to charge wilfulness, as defendant alleged was required under *United States v. Molin*, 244 F. Supp. 1015 (D. Mass. 1965). Tr. at 86-90. We took the issue under advisement. At the close of the government's case, Webb's counsel asked the Court to take judicial notice of the regulation, but we declined to do so because defendants were being prosecuted for violating

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[4] The preamble to the Regulations' discussion of § 1020 states that "willful falsification, distortion, or misrepresentation with respect to any facts related to the project is a violation of federal law."

§ 1020, which only requires that a defendant act "knowingly". The C.F.R. standard was found inapplicable:

I've looked at this regulation and there is no question it's a C.F.R. regulation. And the Court would normally take judicial notice of that, except, I don't think it's relevant to this case. And the reason I don't think it is, is that the statute under which the defendants are being prosecuted in Counts 1 through 4 only contains the adverb "knowingly" . . . And the one Massachusetts case notwithstanding, I think given what I would expect the Fourth Circuit's approach to be on that, I don't think willfulness plays a role in those first four counts. And so, I think this would be completely irrelevant and could, in fact, be misleading. Because the C.F.R. is using a word which is not in the statute. And they're not being prosecuted for a violation of the regulation. They're being prosecuted for a violation of 1020 . . . I realize this is a statute that's almost never used [but] I think it's extremely safe to construe a statute with the specific words that Congress used and they've only used the word 'knowingly' here.

Tr. at 862-63, 865. Defendants have raised no new arguments in their brief which cause us to question the correctness of our ruling during the trial. Accordingly, we find that the government was not required to prove willfulness or specific intent to defraud in order to properly sustain convictions of these defendants under 18 U.S.C. § 1020.

E. Knowledge of the Elements of the Offense

Knowledge must generally be proven with respect to each element of the offense charged. *See, e.g., United States v. Ellen*, 961 F.2d 462, 466-467 n.2 (4th Cir. 1992). Defendants contend that Counts 1 and 3 should be set aside because the government failed to prove that the defendants

knew that the work PDS invoiced was related to the construction of a highway or related project approved by the Secretary of Transportation or his delegee. The government counters that proof of such knowledge was not required in this instance because approval by the Secretary of Transportation or his delegee is merely a jurisdictional element, for which knowledge need not be proved. *See United States v. Feola*, 420 U.S. 671, 675, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975); *United States v. Daughtry*, 48 F.3d 829, 832 (4th Cir. 1995).

We are persuaded, consistent with the Supreme Court's discussion in *Feola*, that the requirement under § 1020 that the prohibited fraudulent statement must either be submitted to or approved by the Secretary of Transportation is only jurisdictional, and nothing more.[5] *See also United States v. Yermian*, 468 U.S. 63, 104 S. Ct. 2936, 82 L. Ed. 2d 53 (1984) (holding that proof of actual knowledge of federal agency jurisdiction is not required under 28 U.S.C. § 1001).

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[5] "Labeling a requirement 'jurisdictional' does not necessarily mean, of course, that the requirement is not an element of the offense Congress intended to describe and to punish. Indeed, a requirement is sufficient to confer jurisdiction on the federal courts for what otherwise are state crimes precisely because it implicates factors that are an appropriate subject for federal concern . . . The significance of labeling a statutory requirement as 'jurisdictional' is not that the requirement is viewed as outside the scope of the evil Congress intended to forestall, but merely that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute. The question, then, is not whether the requirement is jurisdictional, but whether it is jurisdictional only." 420 U.S. at 677 n.9.

F. Mail Fraud Counts

In 1994, the mail fraud statute was amended to also prohibit the use of private or commercial carriers, in addition to the U.S. mails, in attempting to carry out a scheme or artifice to defraud. Defendants contend that the jury verdict should be set aside on all mail fraud counts because the government did not prove that the U.S. mails were used, nor did it prove that the private or commercial carriers that were used had delivered or transported mail in interstate commerce. Specifically, defendants assert that § 1341 is ambiguous, but that the legislative record clearly demonstrates an intent to amend the statute to address fraudulent interstate mailings effected by the use of private or commercial carriers. Defendants therefore ask us to read the statute as proscribing only the interstate use of private or commercial carriers, and to set aside the verdicts under the rule of lenity.

The canons of statutory construction require us to begin by analyzing the text of the statute, which is the "authoritative source" for gleaning legislative intent. *See Holder v. Hall*, 512 U.S. 874, 933, 114 S. Ct. 2581, 129 L. Ed. 2d 687 (1994) (Thomas, J., concurring). In so doing, we should not construe the statute "so as to render any provision of [it] meaningless or superfluous." *Beck v. Prupis*, 529 U.S. 494, 120 S. Ct. 1608, 146 L. Ed. 2d 561 1616 (2000). "If the language is plain and 'the statutory scheme is coherent and consistent'", we may stop our inquiry there. *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 603 (4th Cir. 1999) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)). Given these guiding principles, we are confident that Congress intended the amendments to 18 U.S.C. § 1341 to extend to purely intrastate delivery of mails by private or commercial carriers as long as those carriers engage in interstate deliveries. A reading of § 1341

which would require that the interstate carrier actually deliver the matter interstate would produce an absurd result.

We note, as defendants have recognized, the case law is clear that a violation of § 1341 occurs when a thing is mailed intrastate via the U.S. mail because federal jurisdiction exists under the Postal Power, and not the Commerce Clause. See *United States v. Elliott*, 89 F.3d 1360 (8th Cir. 1996) (citing cases). While jurisdiction lies only under the Commerce Clause for the use of private or commercial carriers, Congress may still regulate their intrastate activities because they are instrumentalities of interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995). Thus, it is not surprising that courts have upheld other statutes under an analogous theory, despite the fact that the specific acts at issue occurred only intrastate. *See, e.g., United States v. Marek*, 198 F.3d 532 (5th Cir. 1999) (finding that Western Union is a facility in interstate commerce and therefore affirming conviction under the federal murder-for-hire statute); *United States v. Weathers*, 169 F.3d 336, 341 (6th Cir. 1991) (finding that intrastate use of a cellular phone constituted use of a facility in interstate commerce under the Travel Act).

The 1994 amendment to § 1341 added a prohibition against sending an item through a private or commercial carrier in furtherance of the fraud. But it also criminalizes knowingly causing an item to be delivered by such a carrier "according to the direction thereon, or at the place at which it is directed to be delivered" in furtherance of the fraud.[6] Thus, by the express terms of the statute, for example, an entity in Virginia could properly be charged with mail fraud under § 1341 if it knowingly caused the item to be delivered in furtherance of the fraud, even if the delivery address is also in Virginia. If indeed Congress had intended to limit the reach of the 1994 amendment to interstate delivery only, then it would have been of paramount importance to amend or otherwise qualify that portion of the statute creating an offense based upon the place of delivery to reflect that such delivery occur across state lines. We can infer from Congress' failure to do so, given the totality of the evidence of what ill Congress was seeking to remedy, that it intended the statute to apply to both intrastate and interstate mailings. *See Burns v. United States,* 501 U.S. 129, 136, 111 S. Ct. 2182, 115 L. Ed. 2d 123 (1991) ("In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective"); *Quest Medical, Inc. v.*

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[6] "Whoever . . . for the purpose of executing [a] scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or things whatever to be sent or delivered by the Postal Service, or *deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier*, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail *or such carrier* according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be [fined or imprisoned]." 18 U.S.C. § 1341 (West 2000) (emphasis on 1994 amendments).

Apprill, 90 F.3d 1080, 1091 (5th Cir. 1996) ("Legislative intent can be inferred from the absence or presence of a particular provision in a statute."). Accordingly, we find that 18 U.S.C. § 1341 facially applies to the intrastate use of private or commercial carriers who engage in interstate commerce.

Likewise, we reject defendants' argument that the verdict should be set aside on Counts 5, 7, and 8 because the government failed to introduce sufficient evidence that the allegedly fraudulent invoices were mailed or that Webb caused the mails to be used. Denise Lade, PDS' officer manager who was responsible for mailing PDS' invoices, testified that after she got the VDOT time sheets for all photogrammetry work out of Webb's office, she would prepare the invoices which were mailed, either by U.S. mail or by UPS Ground, depending on the number to be sent and the type of project. Tr. at 668-70. The time sheets and invoices were maintained, and the mailings effected, all in the ordinary course of business. *Id.* at 666, 670-72. At trial she could not tell how a particular invoice may have been sent merely from looking at the invoice itself, but she was certain that it would have gone out either by U.S. mail or UPS. *Id.* at 680-81. In light of Webb's position within PDS and his experience in the company, we find inherently incredible defendants' argument that he was ignorant of how PDS processed invoices for payment or that the invoices were being mailed. Moreover, in light of Lade's testimony, there was ample evidence upon which the jury could convict the defendants of Counts 5, 7, and 8. *See United States v. United Medical & Surgical Supply Corp.*, 989 F.2d 1390, 1404 (4th Cir. 1993) (holding that a mailing by defendant's agent satisfied mailing element of statute); *United States v. Norton*, 780 F.2d 21 (8th Cir. 1985) (holding that the knowledge requirement is satisfied if

defendant knew or could reasonably foresee that mailing would take place).

G. Notice and Discovery Deficiencies

The defendants argue that the verdict should be set aside on all counts because the notice provided in the indictment and the post-indictment discovery provided to the defendants were insufficient to apprise the defendants of the charges they faced. In particular, defendants contend that the indictment was insufficient because, among other things, it did not specify or allege what services or materials were invoiced, it did not provide the amounts of the false invoices, it did not allege how many time sheets were altered, and it did not allege who among the defendants made the false statements. Moreover, they assert that the Bill of Particulars failed to cure these deficiencies because it did not identify how much time was moved, where it was moved from, and how much of a total loss was sustained.

We find these claims to be without merit, as they were substantially addressed by the Court in the March 24, 2000 pre-trial hearing. During argument for defendants' motion in limine, counsel for the government indicated that the reason he planned on introducing a multitude of time sheets was to rebut any argument on behalf of the defendants that any changes were either mistakes or inadvertent:

Now on the alterations, 34 we've identified as supporting the counts, and I want the freedom to put in some more that the employees have clearly said are false. And sometimes it's, 'I changed them.' Sometimes it's, 'David Webb told me to change them.' Sometimes it's, 'This has been changed after I turned it in.' I want the jury to see the different types of things . . . I identified as much as I could in the grand jury. I did it in the bill of particulars. I

responded with each one and what entries on here were false on each of those 34 [and] I told them, look and this column, and if there were particular dates, I identified the columns on each time sheet.

March 24, 2000 Tr. at 22-23. After considering the defendant's arguments, the Court determined that, in general, the indictment and the bill of particulars was sufficient to apprise the defendants of the charges against them:

> The government is not required in either the grand jury indictment or in the bill of particulars to lay out all the evidence that supports a particular charge. They're required to give defense counsel enough clear notice as to what it is the client is being charged with so they can defend and also plead jeopardy if they're convicted. And with a bill of particulars, again, it's not meant to lay out the government's entire case. It's meant to give the defense a fair shot at defending the case. And I think there is enough detail [here].

Id. at 38. Nevertheless, to insure that the defendants were not crippled by a lack of notice and opportunity to prepare a defense, the Court struck a balance and allowed the government to introduce and use in its case-in-chief only those documents "that have been clearly identified for the defense along the parameters" defense counsel had set. *See id. at 3.* In light of this ruling, we find that the defendants were sufficiently apprised of the specific charges they faced and the evidence against them.

H. Remaining Issues

The defendants also raise numerous additional issues which they contend support setting aside the jury verdict, among them: the Court erred in its jury instructions on mail

fraud and aiding and abetting; the government failed to prevent the completion of the crimes alleged in Counts 7 and 8; the Court erred by admitting into evidence documents and testimony relating to non-charged items and to Counts 2 and 6, for which defendants were acquitted; and the Court erred by failing to suppress evidence illegally obtained by Bradley Broussard, and the tainted fruit of Broussard's allegedly unlawful search and seizure, *i.e.* the statements taken from Webb and the search of PDS, both occurring on January 20, 1999. We have carefully considered each of these arguments, and find them to have no merit.

IV. PDS's Motion to Set Aside the Verdict on the Basis of *Bruton v. United States*.

Defendant PDS asserts that, in light of defendant Webb's decision not to testify, the introduction into evidence of taped conversations in which Webb implicated wrongdoing by PDS violated its Sixth Amendment confrontation rights, relying on *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). Moreover, defendants contend that the Supreme Court has recently emphasized in *Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999), that the mere fact that a statement qualifies as an exception to the hearsay rule does not justify its use in evidence against another defendant when constitutional concerns exist. Thus, PDS concludes that the jury verdict should be set aside as to it because the Court, despite *Bruton*, allowed into evidence the tapes recordings under Fed. R. Evid. 801(d)(2)(D).

We are satisfied that our decision allowing into evidence the tape recordings of Webb, as well as the statements he made to the officers at his home on January 29, 2000, was not erroneous. We reach this conclusion without finding it necessary to decide, as the parties

dispute, whether the evidence adduced at trial sufficiently established a conspiracy so as to alternatively allow this evidence in under Rule 801(d)(2)(E). Under Rule 801(d)(2)(D), a statement by a party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, is not considered hearsay and is therefore admissible. The statements made by Webb clearly satisfy this exception: he was questioned primarily about billing practices and procedures at PDS, while he was currently employed as manager of the photogram department.

In so finding, we are unpersuaded by PDS's argument that allowing the evidentiary exception embodied in Fed. R. Evid. 801(d)(2)(D) to trump *Bruton* effectively eviscerates that case, making a corporation's confrontational rights meaningless. First, *Bruton* and *Lilly* were not cases in which an agency relationship existed between the co-defendants. Thus, because a statement of an agent or servant concerning a matter within the scope of his employment made during the existence of the relationship is an admission of his employer, *see* Charles A. Wright & Arthur R. Miller, 9 *Federal Practice & Procedure* § 6723 (1997), the facts of this case are decidedly different from those in *Bruton* and *Lilly*. Moreover, as the *Lilly* decision recognized, firmly rooted hearsay exceptions are admissible over Sixth Amendment Confrontation Clause objections because the authors of that amendment "obviously intended to respect certain unquestionable rules of evidence" in drafting the Confrontation Clause. *Lilly*, 119 S. Ct. at 1894 (citing *Mattox v. United States*, 156 U.S. 237, 39 L. Ed. 409, 15 S. Ct. 337 (1895)). We agree with the Fifth Circuit, the only court to decide the issue by published opinion, that hearsay exceptions under Rule 801(d)(2)(D) are firmly rooted. *See United States v. Walker*, 148 F.3d 518 (5th Cir. 1998); *United States v.*

Saks, 964 F.2d 1514 (5th 1992). Accordingly, we find that our decision to allow into evidence Webb's various statements was not erroneous.

V. Conclusion

For the foregoing reasons, all defendants' motions are denied. An appropriate Order will follow.

The Clerk is directed to forward copies of this Memorandum Opinion to counsel of record.

Entered this 21st day of June, 2000.

Leonie M. Brinkema

United States District Judge

Alexandria, Virginia

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' Joint Motion to Set Aside the Verdict and Enter an Order for Judgment of Acquittal or for a New Trial be and is DENIED; and it is further

ORDERED that defendant Photogrammetric Data Services, Inc.'s Motion to Set Aside the Verdict on the Basis of *Bruton v. United States*, and Enter an Order for Judgment of Acquittal or a New Trial be and is DENIED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 21st day of June, 2000.

Leonie M. Brinkema

United States District Judge

Alexandria, Virginia

Supreme Court, U.S.
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No. 01-722

In the Supreme Court of the United States

PHOTOGRAMMETRIC DATA SERVICES, INC., AND DAVID G. WEBB, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal mail fraud statute, 18 U.S.C. 1341, encompasses intrastate deliveries by private or commercial interstate carriers.

2. Whether application of the mail fraud statute to such deliveries is a valid exercise of Congress's authority under the Commerce Clause.

3. Whether, under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), the district court was required to determine petitioners' sentences under the Sentencing Guidelines based solely on facts that were found by the jury beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 259 F.3d 229. The opinion of the district court (Pet. App. 52a-74a) is reported at 103 F. Supp. 2d 875.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2001. The petition for a writ of certiorari was filed on October 26, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Photogrammetric Data Services, Inc. (PDS) and David Webb were found guilty of two counts of highway project fraud, in violation of 18 U.S.C. 1020, and three counts of mail fraud, in violation of 18 U.S.C. 1341. The district court sentenced PDS to concurrent terms of one year's probation and a fine of $522,045.29 on each count of conviction. The district court sentenced Webb to concurrent terms of 24 months' imprisonment, to be followed by two years of supervised release, on each count of conviction. The district court also ordered both PDS and Webb to pay restitution in the amount of $435,038.33. The court of appeals affirmed. Pet. App. 1a-51a.

1. Petitioner PDS, a Virginia corporation that prepared topographic maps from aerial photography and ground surveys, performed subcontracting work for firms having contracts with the Virginia Department of Transportation (VDOT) to complete the preliminary engineering work for highway construction projects. Pet. App. 3a. Petitioner Webb was a managerial employee of PDS, responsible for the billing on the VDOT jobs. *Ibid.* Between 1994 and 1999, petitioners engaged in a scheme to defraud VDOT by submitting inflated invoices to VDOT's prime contractors, who in turn submitted the invoices to VDOT. *Ibid.* Through that fraudulent scheme, PDS "increased the billed amounts on almost every VDOT job by approximately ten to fifteen percent, resulting in overbilling of approximately $100,000 to $200,000 per year for five years." *Id.* at 4a. The fraudulent invoices were sent from PDS's offices in Virginia to VDOT's prime

contractors in Virginia through either the United States Postal Service or the United Parcel Service (UPS), a commercial interstate carrier. *Id.* at 23a-24a.[1]

2. Petitioners were indicted in the United States District Court for the Eastern District of Virginia on four counts of making false statements about the quantity and cost of the work performed in connection with the construction of a highway project, in violation of 18 U.S.C. 1020 (Counts 1-4); and four counts of using the mail and other interstate commercial carriers in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341 (Counts 5-8). At the close of the government's case, the district court granted a motion for judgment of acquittal on Counts 2 and 6. The jury found each petitioner guilty of two counts of highway project fraud (Counts 1 and 3) and three counts of mail fraud (Counts 5, 7, 8). The jury found petitioners not guilty of the remaining count of highway project fraud (Count 4). Pet. App. 53a-54a.

The district court denied petitioners' post-verdict motions for a judgment of acquittal or a new trial. Pet. App. 52a-74a. The court rejected petitioners' argument that 18 U.S.C. 1341 does not apply to intrastate deliveries by interstate commercial carriers. As amended in 1994, Section 1341 establishes criminal penalties for any person who, in furtherance of a fraudulent scheme, "places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or

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[1] "Although the government was unable to present evidence as to which carrier was used for any particular invoice or that any particular invoice actually crossed state lines in route from PDS to the prime contractor, it did successfully prove that one of these interstate carriers (the Postal Service or UPS) was always used to execute the fraudulent overbilling scheme." Pet. App. 24a.

delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier." Based on the text of the statute, the district court was "confident that Congress intended the amendments to 18 U.S.C. § 1341 to extend to purely intrastate delivery of mails by private or commercial carriers as long as those carriers engage in interstate deliveries." Pet. App. 65a. The court further explained that, under the Commerce Clause, Congress may regulate the intrastate activities of private or commercial carriers "because they are instrumentalities of interstate commerce." *Id.* at 66a.

At sentencing, petitioners were assigned a base offense level of 6 pursuant to Sentencing Guidelines § 2F1.1 (1998) (now deleted and combined with Guidelines § 2B1.1). Although the total loss amount for the invoices identified in the five counts of conviction was approximately $20,000,[2] the district court estimated the loss amount resulting from the entire fraudulent scheme to be $435,038.33, which corresponded to a nine-level increase in the offense level. See Guidelines § 2F1.1(b)(1)(J) (1998). The district court also imposed a two-level increase because the offense involved more than minimal planning. See Guidelines § 2F1.1(b)(2)(A) (1998). Those increases resulted in an adjusted offense

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[2] Petitioners use $19,008 (Pet. 3) as the total loss figure for the five invoices identified in the counts of conviction. That figure, however, is based on the testimony of a government agent before the grand jury, which petitioners reviewed with the agent at trial. The trial testimony covered some additional false entries on time sheets supporting the same five invoices. As a result, the loss figure based on the trial testimony ($21,852.58) is higher than the figure based upon the grand jury testimony. See Gov't C.A. Br. 39 & n.11.

level of 17. The district court sentenced Webb to concurrent terms of 24 months' imprisonment, to be followed by two years' supervised release, on each count of conviction. PDS was sentenced to one year's probation and ordered to pay a fine of $522,045.29. Both petitioners were ordered jointly to make restitution in the amount of $435,038.33. Pet. App. 42a; Gov't C.A. Br. 46 n.16.

3. The court of appeals affirmed. Pet. App. 1a-51a. The court rejected petitioners' argument that intrastate deliveries by a commercial interstate carrier fall outside the scope of the mail fraud statute. *Id.* at 24a-28a. The court found that "the unambiguous language of current § 1341 criminalizes all mailings in furtherance of a fraudulent scheme if the mailings are placed with either the United States Postal Service or with other private or commercial mail delivery services which operate interstate, regardless of whether any particular mailing actually crosses state lines." *Id.* at 26a. The court also observed that before 1994, when the reach of the mail fraud statute was limited to use of the United States Postal Service, the statute made no distinction between intrastate and interstate mailings. *Id.* at 25a. Because "Congress elected to use virtually identical language as that dealing with the use of the United States mail" when it broadened the statute to encompass private or commercial interstate carriers, *id.* at 26a, the court found it "obvious that Congress intended to prohibit the use of private and commercial interstate carriers to further fraudulent activity in the same way such use of the United States mail had long been prohibited," *id.* at 27a.

The court of appeals further held that the mail fraud statute, as applied to intrastate deliveries by private or commercial interstate carriers, is a permissible exercise

of Congress's Commerce Clause power. Pet. App. 28a-35a. The court explained that, under the Commerce Clause, Congress may regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and activity that has a substantial effect on interstate commerce. *Id.* at 29a. The court concluded that "[p]rivate and commercial interstate carriers are facilities or instrumentalities of interstate commerce, which Congress can regulate and protect from harm, 'even though the [particular] threat may come only from [an] intrastate activity.'" *Ibid.* (quoting *United States* v. *Lopez*, 514 U.S. 549, 558 (1995)).

The court of appeals also rejected petitioners' argument that their rights under the Due Process Clause were violated because their sentences were based on a total loss amount found by the sentencing judge by the preponderance of the evidence. Pet. App. 42a-47a. The court held that *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), did not deprive a district court of the authority to determine facts that serve to increase a defendant's sentence within the range authorized by statute. Pet. App. 43a-46a. The court also held that the instant case was not an "extraordinary" one in which a sentencing factor exerts "so great or disproportionate" an effect on the sentence that it becomes a "tail which wags the dog of the substantive offense." *Id.* at 46a (quoting *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986)).

Judge Williams filed an opinion concurring in part and concurring in the judgment. Pet. App. 48a-51a. Judge Williams concluded that application of the mail fraud statute to intrastate use of a private or commercial interstate carrier is more appropriately sustained as regulation of an activity that substantially affects interstate commerce than as regulation of the "instrumentalities" of interstate commerce. *Id.* at 51a.

ARGUMENT

1. Petitioners contend (Pet. 6-11) that the mail fraud statute is inapplicable to intrastate deliveries by private or commercial interstate carriers. As the court of appeals correctly recognized (Pet. App. 26a), that claim is contrary to the "unambiguous language" of the statute, which encompasses "any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier." 18 U.S.C. 1341. The statute does not require that the matter be "sent or delivered" across state lines. Although petitioners suggest (Pet. 6) that the scope of the statute is unclear because Congress did not insert the phrase "including intrastate deliveries" after the phrase "interstate carrier," the absence of such superfluous terms does not affect the statute's clarity. Cf. *Burns* v. *United States*, 501 U.S. 129, 136 (1991) ("In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective.").

The history and structure of the mail fraud statute further support the court of appeals' interpretation. Before 1994, Section 1341 applied only to the use of the United States Postal Service, but the statute clearly encompassed both intrastate and interstate mailings. See, *e.g.*, Pet. App. 25a; *United States* v. *Lefkowitz*, 125 F.3d 608, 617 (8th Cir. 1997), cert. denied, 523 U.S. 1079 (1998); *United States* v. *Elliott*, 89 F.3d 1360, 1364 (8th Cir. 1996), cert. denied, 519 U.S. 1118 (1997). In 1994, Congress amended the statute to cover the use of private or commercial interstate carriers in the execution of fraudulent schemes. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322,

§ 250006, 108 Stat. 2087. In so doing, "Congress elected to use virtually identical language as that dealing with the use of the United States mail." Pet. App. 26a. Thus, the amended statute imposes criminal liability on an individual who "places in any post office or authorized depository for mail matter, any matter or thing whatever *to be sent or delivered by the Postal Service*, or deposits or causes to be deposited any matter or thing whatever *to be sent or delivered by any private or commercial interstate carrier*." 18 U.S.C. 1341 (emphasis added). Congress's use of parallel language in extending the coverage of Section 1341 to private or commercial interstate carriers demonstrates that it "intended to prohibit the use of private and commercial interstate carriers to further fraudulent activity in the same way such use of the United States mail had long been prohibited"—*i.e.*, for both intrastate and interstate deliveries. Pet. App. 27a.

Petitioners also contend (Pet. 9-10) that because the wire fraud statute, 18 U.S.C. 1343, requires an interstate transmission, the mail fraud statute should likewise be construed to apply only to the interstate deliveries of private or commercial carriers. As the court of appeals recognized, however, petitioners' argument fails to account for the "significant textual differences" between the two statutes. Pet. App. 33a n.3. "[T]he language of the wire fraud statute requires that a communication actually travel 'in interstate or foreign commerce,' whereas the language of the mail fraud statute requires only that a mailing be deposited with an 'interstate carrier.'" *Ibid.*[3]

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[3] Citing *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987), petitioners assert (Pet. 10) that this Court has previously held that the wire fraud statute and the mail fraud statute should be given

Petitioners cite no decision, and we are aware of none, that has construed Section 1341 to be inapplicable to intrastate deliveries by private or commercial interstate carriers. Absent a conflict in authority, petitioners' statutory claim does not warrant this Court's review.

2. Petitioners contend (Pet. 11-15) that if Section 1341 is construed to cover the intrastate use of private or commercial interstate carriers, it exceeds Congress's authority under the Commerce Clause. That claim lacks merit.

In *United States* v. *Lopez*, 514 U.S. 549 (1995), this Court identified three broad categories of activity that Congress may regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come from intrastate activities; and (3) activities that substantially affect interstate commerce. *Id.* at 558-559. Application of the mail fraud statute to the intrastate use of private and commercial interstate carriers is a permissible exercise of congressional authority under the second *Lopez* category, as a regulation and protection of the instrumentalities of interstate commerce.

In the present case, petitioners sent false invoices by UPS from PDS's Virginia headquarters to the Virginia offices of its prime contractors. Petitioners do not

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similar construction. In *Carpenter*, this Court held that, because the mail and wire fraud statutes "share the same language" with respect to the "scheme to defraud" element, the Court would apply "the same analysis" to that element of both statutes. 484 U.S. at 25 n.6. In *Neder* v. *United States*, 527 U.S. 1 (1999), however, the Court noted that the mail and wire fraud statutes contain "different jurisdictional elements." *Id.* at 20.

dispute that UPS is an instrumentality of interstate commerce. See Pet. 13; Pet. App. 29a; *United States* v. *Griffith*, 85 F.3d 284, 286-288 (7th Cir.) (Federal Express deliveries were deliveries by an instrumentality in interstate commerce), cert. denied, 519 U.S. 909 (1996). Congress is therefore authorized to prohibit the use in fraudulent activity of UPS facilities and services, even though a particular threat may come only from an intrastate activity. As the court of appeals correctly held, "when Congress acts to regulate or protect an instrumentality of interstate commerce under the second *Lopez* category, federal jurisdiction is supplied by the nature of the instrumentality or facility used, not by separate proof of interstate movement, and federal jurisdiction based on *intra* state use of *inter* state facilities is an appropriate exercise of the commerce power." Pet. App. 30a (internal quotation marks omitted).

While acknowledging that Congress has power to regulate instrumentalities of interstate commerce and to protect them from direct harm, petitioners contend that Congress is not authorized to prevent the misuse of those instrumentalities in furtherance of crimes such as fraud. Pet. 12. Petitioners observe that the examples of the second category of Commerce Clause legislation cited in *Lopez* (see 514 U.S. at 558)—*Shreveport Rate Cases*, 234 U.S. 342 (1914), *Southern Railway* v. *United States*, 222 U.S. 20 (1911), and *Perez* v. *United States*, 402 U.S. 146 (1971)—involved either direct regulation of an instrumentality of interstate commerce or an effort to protect the instrumentality from direct harm. In listing such examples, however, the *Lopez* Court did not purport to define the outer boundaries of congressional authority under the second category of valid Commerce Clause legislation.

Several courts of appeals have relied on Congress's power to protect instrumentalities of interstate commerce in upholding convictions of defendants who misused different instrumentalities, even where the misuse did not directly harm the instrumentality. In *United States* v. *Marek*, 238 F.3d 310 (en banc), cert. denied, 122 S. Ct. 37 (2001), the Fifth Circuit upheld a conviction under the federal murder-for-hire statute, 18 U.S.C. 1958, based on the defendant's intrastate use of Western Union to transfer payment to a hit man. The court explained that the statute as applied was valid "because intrastate use of interstate facilities is properly regulated under Congress's second-category *Lopez* power." 238 F.3d at 318. In *United States* v. *Baker*, 82 F.3d 273, cert. denied, 519 U.S. 1020 (1996), the Eighth Circuit affirmed a conviction under the Travel Act, 18 U.S.C. 1952(a), based upon the intrastate use of an automated teller machine (ATM) that was part of an interstate network of such machines. Although the crime caused no direct harm to the ATM network, as the defendant simply caused his extortion victim to use the network to withdraw cash, the Eighth Circuit sustained the conviction under the second *Lopez* category, because the ATM machine was a facility in interstate commerce. 82 F.3d at 275-276. In *United States* v. *Gilbert*, 181 F.3d 152 (1st Cir. 1999), a defendant was convicted of using a telephone to make a bomb threat in violation of 18 U.S.C. 844(e). Although there was no evidence that the telephone call was made interstate or caused direct harm to the telephone system, the First Circuit upheld the conviction against a Commerce Clause challenge. 181 F.3d at 157-159. The court stated that "a telephone is an instrumentality of interstate commerce and this alone is a sufficient basis for jurisdiction based on interstate commerce." *Id.* at

158. See *United States* v. *Clayton*, 108 F.3d 1114, 1116-1117 (9th Cir.) (holding that cellular telephone identification numbers are instrumentalities of interstate commerce and that the misuse of those numbers to clone cellular telephones was properly made a federal crime under Congress's power to protect the instrumentalities of interstate commerce), cert. denied, 522 U.S. 893 (1997). Petitioners identify no contrary authority.[4]

3. Relying on *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), petitioners contend (Pet. 15-23) that their sentences were unlawfully imposed because the district court rather than the jury made the loss amount findings that were used to calculate petitioners' Guidelines sentencing ranges. In *Apprendi*, this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Petitioners argue that the district court's computation of the Guidelines sentencing range must likewise be based

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[4] Application of Section 1341 to petitioners' conduct may also be sustained under the third category of permissible Commerce Clause legislation described in *Lopez*, as regulation of an activity substantially affecting interstate commerce. See *Lopez*, 514 U.S. at 558-560. In her concurring opinion, Judge Williams had "no difficulty concluding that the furtherance of schemes devised for the purpose of defrauding others can be viewed as economic activity within the meaning of *Lopez* and [*United States* v. *Morrison*, 529 U.S. 598 (2000)]." Pet. App. 51a. Judge Williams further explained that "in the aggregate, the intrastate use of interstate carriers to further fraudulent schemes has a substantial harmful effect on interstate commerce." *Ibid.*

solely on facts alleged in the indictment and found by the jury beyond a reasonable doubt.

a. Petitioners contend (Pet. 16-18) that this Court should grant review to consider the continuing vitality of *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), in light of the Court's subsequent decision in *Apprendi*. In *McMillan*, this Court upheld the constitutionality of a sentencing scheme under which any person convicted of certain felonies would be subject to a mandatory minimum penalty of five years' imprisonment if the sentencing judge found, by a preponderance of the evidence, that the defendant visibly possessed a firearm during the commission of the offense. *Id.* at 87-88. In the present case, by contrast, the district court's loss amount findings did not trigger the application of any statutory minimum sentence. Petitioners were simply sentenced within the statutory ranges for the offenses of conviction based upon the application of the Sentencing Guidelines. Because this case does not involve the imposition of a statutory minimum sentence, there is no need to hold the petition pending this Court's decision in *Harris* v. *United States*, cert. granted, 122 S. Ct. 663 (2001), in which this Court granted review on the following question: "Given that a finding of 'brandishing,' as used in 18 U.S.C. § 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of 'brandishing' be alleged in the indictment and proved beyond a reasonable doubt?"

b. The court of appeals correctly rejected petitioners' contention that *Apprendi* requires jury findings with respect to all facts that may increase a defendant's Guidelines sentencing range. See Pet. App. 45a-46a. This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that so

long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513, 514 (1998) (Guidelines "instruct *the judge* * * * to determine" the type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind"). *Apprendi* did not hold otherwise. See *Apprendi*, 530 U.S. at 497 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards*, 523 U.S. at 515).

The Sentencing Guidelines simply "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 402 (1995); see *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). A district court retains the authority to "depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Because the Guidelines leave the sentencing court with significant discretion to impose a sentence within the statutory range, and because the Guidelines cannot increase the statutory maximum penalty for a criminal offense, see Guidelines § 5G1.1; *Edwards*, 523

U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines"), *Apprendi* does not support a challenge to the constitutionality of the Guidelines.

Petitioners also suggest that proof of relevant conduct by a higher standard than preponderance of the evidence is required before a sentencing court may use that conduct to impose a sentence "within the statutory maximum, but disproportionate to the sentence warranted based on the facts alleged in the indictment and proven at trial." Pet. 22; see Pet. 21-23. As the Court noted in *Watts*, there is "a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be [proved by] clear and convincing evidence." 519 U.S. at 156 & n.2 (collecting cases); see *United States* v. *Kikumura*, 918 F.2d 1084, 1100-1102 (3d Cir. 1990). This case, however, is not an appropriate vehicle for resolving any disagreement among the circuits on that issue.

This case does not involve "extreme circumstances" in which relevant conduct findings made by the judge at sentencing "dramatically" increase the defendant's punishment. Petitioners contend that "[t]he total amount of loss associated with the convicted counts was $19,008." Pet. 3; see Pet. App. 43a; but see note 2, *supra*. If the district court had used that loss amount in applying the Guidelines, petitioners' total offense level would have been 11 rather than 17, see Pet. 4 n.1; Guidelines § 2F1.1(b)(1)(D) (1998); pp. 4-5, *supra*, and petitioner Webb would have been subject to a Guidelines range of 8-14 months' imprisonment. Instead, Webb was sentenced to 24 months' imprisonment. The court of appeals correctly concluded that the effect of the district court's loss findings was not "so great or

disproportionate as to * * * implicate due process concerns." Pet. App. 46a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of the United States

No. 01-722

PHOTOGRAMMETRIC DATA SERVICES, INC. and
DAVID G. WEBB,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

Certiorari is warranted in this case: (1) to resolve an ambiguity in the mail fraud statute and to establish the limits of congressional power to define crimes in light of *United States v. Lopez*; and (2) to decide the viability of *McMillan v. Pennsylvania* in light of *Apprendi v. New Jersey*.

1. This is the first case to hold that the mail fraud statute applies to purely intrastate shipments made via private commercial carriers. Anne S. Dudley and Daniel F. Schubert, *Mail and Wire Fraud*, 38 Am. Crim. L. Rev. 1025, 1030 (2001). There is no need to let the issue percolate. Certiorari is appropriate to correct a misinterpretation of one of the most commonly-charged criminal statutes and to serve

the broader purpose of defining the limits on Congress to create new federal crimes.

The mail fraud statute was expanded in 1994 to proscribe the use of private *interstate* carriers in furtherance of a fraud. Respondent argues that the 1994 mail fraud amendment regulates *intrastate* private deliveries. Respondent contends that since the pre-1994 mail fraud statute applied to intrastate deliveries by the Postal Service, the 1994 amendment extending the scope of the statute to deliveries by private carriers must also apply to intrastate deliveries. Respondent glosses over the fundamental distinction between Congress's plenary power under the Postal Clause and its more limited power under the Commerce Clause.

While lower courts have held that the pre-1994 mail fraud statute proscribed both interstate and intrastate misuse of the United States mails (Br. in Opp. 7), this conclusion was premised on Congress's power under the Postal Clause. This does not mean the amended statute has the same breadth in its regulation of private carriers pursuant to the Commerce Clause.

Respondent concedes the wire fraud statute, which is an exercise of congressional authority under the Commerce Clause, does not apply to intrastate use of wires. Yet, Respondent refuses to give the same effect to the 1994 mail fraud amendment.

Rather than focus on the constitutional authority being exercised, Respondent focuses on supposed "significant textual differences" between the wire fraud statute and the 1994 mail fraud amendment and textual similarities between the mail fraud amendment and the pre-1994 mail fraud statute. Br. in Opp. 8.

In fact, the 1994 amendment language is more similar to the wire fraud statute than it is to the pre-1994 mail fraud

statute.[1] The pre-1994 mail fraud statute addresses items "delivered by the Postal Service." It does not confine itself to items delivered by the *interstate* mails. The 1994 amendment, by contrast, is limited to items "delivered by any private or commercial *interstate* carrier." (Emphasis added.) Likewise, the wire fraud statute reaches wire communications "in interstate or foreign commerce."

The 1994 amendment is, at best, ambiguous as to whether it reaches private intrastate deliveries. While Respondent advances one plausible reading of the statute, it is at least as likely that in enacting the 1994 amendment regulating private commerce, Congress, as it did when it enacted the wire fraud statute for the same purpose, limited itself to interstate communications.

It is important for the Court to resolve this ambiguity. First, this will be a continuing issue in mail fraud cases. Second, resolution will aid lower courts that have struggled with the proper interpretation of similar jurisdictional components of other federal criminal statutes.[2]

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[1] Even if the 1994 amendment precisely tracked the language of the earlier version of the mail fraud statute, this would not mean that each applies to intrastate deliveries. Different congressional enactments promulgated at different times for different purposes pursuant to different Constitutional provisions do not necessarily have the same meaning, even where identical language is used. *See, e.g., Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433-34 (1932).

[2] *Compare United States v. Weathers*, 169 F.3d 336 (CA6 1999) (18 U.S.C. § 1958 applied to intrastate cellular telephone call only because placing intrastate call resulted in transmission of interstate signal); *United States v. Paredes*, 950 F. Supp. 584 (S.D.N.Y. 1996) (§ 1958 does not reach use of beeper to contact person in same state), *aff'd w.o. op.*, 162 F.3d 1149 (CA2 1998); *United States v. Barry*, 888 F.2d 1092 (CA6 1989) (intrastate use of mails failed to meet federal jurisdictional requirement of then-existing version of the Travel Act); *United States v. Kammersell*, 7 F. Supp. 2d 1196 (D. Utah 1998) (18 U.S.C. § 875(c) applied to Internet message sent within state, because transmission actually crossed state lines); *United States v. Stevens*, 842 F. Supp. 96 (S.D.N.Y. 1994) (§ 1958 applied to purely intrastate use of paging system, only because paging system transmits signals across state lines

Respondent's reading of the 1994 amendment assumes that Congress could constitutionally regulate the use of intrastate private deliveries. Respondent argues that federal criminal regulation of the purely intrastate misuse of a private carrier falls squarely within the second category of *United States v. Lopez*, 514 U.S. 549 (1995).[3] This conclusion was not so apparent to the panel below, which divided on this issue. Moreover, Respondent's position mistakenly reads *Lopez* as a significant expansion of congressional power.

Respondent acknowledges that each of the cases cited in *Lopez* in its second category entails the direct regulation of an instrumentality of interstate commerce or an effort to protect an instrumentality of interstate commerce from direct harm. *See* Br. in Opp. 10. Yet, Respondent argues that these are merely illustrative and do not define the "outer boundaries" of congressional authority.

Respondent ignores the holding and reasoning of *Lopez*, which was to define, for the first time in decades, specific limitations on congressional power under the Commerce Clause and turns the true import of *Lopez* on its head. The Court has never indicated that the cases it

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regardless of actual location of recipient; § 1958 would not apply to intrastate telephone call) *with United States v. Marek*, 238 F.3d 310 (CA5 2001) (*en banc*) (noting that its reasoning is in conflict with *Weathers*, majority held § 1958 applied to intrastate wire transfer; five dissenting judges concluded that § 1958 did not apply), *cert. denied*, 122 S. Ct. 37 (2001); *United States v. Baker*, 82 F.3d 273 (CA8 1996) (amended § 1952 applied to intrastate use of interstate ATM network); *United States v. Heacock*, 31 F.3d 249 (CA5 1994) (any use of mails met federal jurisdictional requirement of prior version of § 1952); *United States v. Riccardelli*, 794 F.2d 829 (CA2 1986) (same).

[3] The Court in *Lopez*, 514 U.S. at 558-59, stated that the enforcement of criminal law is primarily left to the States and delineated three narrow exceptions to that rule permitting federal regulation under the Commerce Clause of: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce.

carefully chose to illustrate the second *Lopez* category were not intended to define the boundaries of that category. If the examples cited in *Lopez* do not constitute the boundaries of Congress's delineated power, lower courts are left with no guidance as to where the actual outer boundaries lie. Absent such guidance, lower courts can read *Lopez* category two as an almost unlimited grant of power to Congress to create new federal crimes.

Respondent misreads the second *Lopez* category to allow Congress to regulate any use of an instrumentality that has an interstate component, rather than to regulate the instrumentality itself. Under Respondent's reading, the second *Lopez* category completely subsumes the first category, regulation of the use of channels of interstate commerce.[4]

Category one concerns regulation of the use of the channels of interstate commerce. Category one regulation has traditionally regulated things moving or people traveling between states. The interstate movement component in these statutes is essential to allow Congress to regulate activity that would otherwise be left to the states.

Respondent's argument is that the interstate movement component found in so many federal statutes is unnecessary. Respondent's position is that so long as the activity regulated involves the use of a "channel" of interstate commerce that is a sufficient federal nexus. That interpretation of *Lopez* category two completely swallows the first *Lopez* category and gives Congress almost unlimited power to define new federal crimes. That is a perversion of federalism, which presumes states hold most of the power to define crimes subject only to the limited exception of the Commerce Clause.

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[4] *See Paredes*, 950 F. Supp. at 589 ("The weakest link in the government's argument is its failure to set reasonable bounds on federal criminal jurisdiction. . . . After *Lopez*, the government's theory seems a slender reed upon which to rest the exercise of federal jurisdiction . . .").

Under Respondent's view, Congress could have written the wire fraud statute to reach intrastate wires. Similarly, 18 U.S.C. § 2314, proscribing the transportation of stolen goods in interstate commerce, need not require that the property be transported across state lines, as long as the property is transported along some portion of an interstate network. Thus, if property is stolen in Rockville, Maryland and transported three miles along I-270 to Gaithersburg, Maryland, a federal offense would have been committed.

Such regulation is possible only if *Lopez* represents an expanded view of congressional power to federalize crimes. If such a result was, in fact, intended by *Lopez*, the Court should state so explicitly. Conversely, if Respondent is incorrect, the Court should clarify the true, more circumscribed limits of the second *Lopez* category.

2. In the second question presented, certiorari is warranted to decide the viability of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Petitioners requested that the Court determine whether facts exposing a defendant to a specific sentencing range must be proven to a jury beyond a reasonable doubt. This question has been flagged by several Justices in recent years, but has yet to be resolved.

This issue calls into question the constitutionality of current practices under the Sentencing Guidelines. Respondent contends that the Court has already passed on the constitutionality of the Guidelines and endorsed the sentencing practices thereunder, citing *Mistretta v. United States*, 488 U.S. 361 (1989) and *Edwards v. United States*, 523 U.S. 511, 513-14 (1998).

Mistretta concerned a separation of powers challenge to the Guidelines. It is not instructive on whether the sentencing practices in this case can withstand due process and Sixth Amendment challenges.

The citation to *Edwards* is even less enlightening. The passage cited by Respondent (the Guidelines "instruct *the*

judge . . . to determine" the type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon the amount and kind") is merely an observation as to what the Guidelines require. Br. in Opp. 14. The *Edwards* Court did not purport to address the constitutionality of those practices.[5]

Respondent contends that *Apprendi* does not support a challenge to the constitutionality of the Guidelines. That argument is baseless. *Apprendi* states that "[i]t is unconstitutional . . . to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed," *Apprendi*, 530 U.S. at 490, and therefore casts doubt on the constitutionality of the Guidelines. Indeed, Justice O'Connor's dissent noted *Apprendi* could apply "to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the federal Sentencing Guidelines)." *Id.* at 544. Review is warranted to resolve this question which was raised, but left unanswered, in *Apprendi*.

Respondent apparently recognizes that, if certiorari is not granted, the question presented here is likely a hold for *Harris v. United States*, *cert. granted*, 122 S. Ct. 663 (December 10, 2001), in which the Court granted review to resolve whether a finding of "brandishing," resulting in an increased mandatory minimum sentence under 18 U.S.C. § 924(c)(1)(A), must be alleged in the indictment and proved beyond a reasonable doubt. Br. in Opp. 13. This case is different and should not be held, the Respondent contends, because *Harris* involves an increase in the statutory minimum sentence, whereas this case involves an increase in the prescribed sentencing range under the Guidelines. *Id.*

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[5] In fact, the Court stated, "we need not, and we do not, consider the merits of petitioners' statutory and constitutional claims." *Edwards*, 523 U.S. at 516.

This case and *Harris* do, however, present the same constitutional sentencing issue. Both federal statutes and the Guidelines are binding on the courts. From a constitutional perspective, it does not make a difference whether the mandatory minimum range of punishment to which a defendant is exposed is set forth in a statute, or in the Guidelines. Regardless of the source of the minimum sentence, the impact on the defendant is precisely the same. *See Apprendi*, 530 U.S. at 522 ("What matter[s is] simply the overall increase in the punishment provided by law") (Thomas, J., concurring); Benjamin J. Priester, *Constitutional Formalism and the Meaning of Apprendi v. New Jersey*, 38 Am. Crim. L. Rev. 281, 296 (2001) (elaborating and citing cases).

The constitutional question presented here – whether the facts that expose a defendant to a specific sentencing range must be proved to a jury beyond a reasonable doubt – is broader than the sentencing issue presented in *Harris*. Nevertheless, *Harris* could be decided in ways that would reach the question presented here; at a minimum, this case should be held until after the Court rules in *Harris*.

If *Harris* is not resolved as a matter of statutory interpretation, the continuing viability of *McMillan* in light of *Apprendi* will likely be resolved by *Harris*, because the defendant's mandatory minimum sentence was based on an uncharged and unproved post-trial factual finding. If *Harris* is resolved by overruling *McMillan* the Court could grant certiorari and then vacate and remand in light of *Harris*.

Certiorari will be warranted even if *McMillan* is not overruled. Respondent concedes that there is a significant split among the circuits on the issue of whether relevant conduct that would substantially increase a sentence must be proved by clear and convincing evidence or some other evidentiary standard. Br. in Opp 15. *See United States v. Watts*, 519 U.S. 148, 156 & n.2 (1997) (recognizing split and collecting cases); see also *Id.* at 170 ("the cases raise a

question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system.") (Kennedy, J., dissenting). Nevertheless, Respondent contends that this case is not the appropriate vehicle for resolving that split because the sentences imposed are not sufficiently "extreme" or "dramatic" to implicate due process concerns. Br. in Opp. 15-16. That argument cannot withstand scrutiny.

The Government proved that defendants' actions resulted in an amount of loss of $19,008. This should have exposed Mr. Webb only to a 3-level increase in his offense level under (then applicable) § 2F1.1(b)(1)(D) of the Guidelines. The district court's $435,000 amount of loss finding, however, resulted in a base offense increase of 9 levels causing the defendants to be sentenced at an offense level of 17, rather than 11. This finding tripled the minimum prison sentence to which Mr. Webb was exposed and more than doubled his maximum prison sentence exposure. It also meant the difference between a restitution order of less than $20,000 and one for $435,000.

The impact was similar on the corporate defendant. The amount of loss finding increased the corporate defendant's restitution order from $20,000 to $435,000 and increased its minimum fine from $36,000 to $522,000. Thus, the corporate defendant was required to pay $957,083 in fines and restitution on a proved loss of less than $20,000, a 48-1 ratio.

Such increases are of constitutional significance. "[I]t can hardly be said that the potential doubling of one's sentence . . . has no more than a nominal effect." *Apprendi*, 530 U.S. at 495 (stating that the increase in years behind bars is "unquestionably of constitutional significance"); *Glover v. United States*, 531 U.S. 198, 203-04 (2001) ("our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance"; criticizing the Government's position as "not well considered . . . because there is no obvious dividing line by which to measure how

much longer a sentence must be for the increase to constitute substantial prejudice").

This case presents an ideal factual scenario to resolve what appears to be irreconcilable tension between *McMillan* and *Apprendi* and to resolve a circuit split on the question of what standard of proof should be used in cases where "other relevant conduct" findings are used to increase a sentence substantially.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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